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AMERICAN BAR ASSOCIATION

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Important Work of Uncle Sam's Lawyers

Our Anti-Trust Laws and the Economic Situation
By DAVID L. PODELL

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Annual Statements, January 1, 1931

THE TRAVELERS

L. EDMUND ZACHER, President

HARTFORD, CONNECTICUT

The Travelers Insurance Company

(Sixty-seventh Annual Statement)

Has (Assets) **$632,922,943.82**

These funds are in interest-bearing bonds of the United States and other governments (including states, provinces, and cities), in securities of railroads and public utilities, in mortgages on city real estate and farms, in other income-producing holdings, and in cash. While thus held for the protection of the Company's policyholders and their beneficiaries, these funds also supply capital for the maintenance and development of public works, transportation, commerce, agriculture and industry. Of this amount the Company

Is Reserving **$585,959,405.04**

Actuarial calculations show that $569,035,343.89 would be sufficient to meet all obligations under policy contracts and to pay all taxes and discharge all other liabilities which had been incurred prior to January 1, 1931, but on which payment was not then due. That is the total amount which the insurance laws require. The Company has, however, voluntarily set aside the further sum of $16,924,061.15, as an additional measure of safety, to care for epidemics, catastrophes and business depressions.

For the Further Protection of Policyholders . . . **$46,963,538.78**

This is the sum by which the assets exceed the reserves and all other liabilities and represents $20,000,000.00 capital and $26,963,538.78 surplus.

Life Insurance in Force **$4,889,122,692.00**

The Travelers Indemnity Company

(Twenty-fifth Annual Statement)

Has (Assets) **$21,411,223.94**

Is Reserving **$13,316,383.71**

Of this amount $11,041,642.11 is for legal reserves and other liabilities and $2,274,741.60 is special reserve which the Company has voluntarily set aside as an additional measure of safety.

For the Further Protection of Policyholders . . . **$8,094,840.23**

This is the sum by which the assets exceed the reserves and all other liabilities and represents $3,000,000.00 capital and $5,094,840.23 surplus.

The Travelers Fire Insurance Company

(Seventh Annual Statement)

Has (Assets) **$14,949,240.56**

Is Reserving **$10,774,800.87**

Of this amount $9,808,805.19 is for legal reserves and other liabilities and $965,995.68 is special reserve which the Company has voluntarily set aside as an additional measure of safety.

For the Further Protection of Policyholders . . . **$4,174,439.69**

This is the sum by which the assets exceed the reserves and all other liabilities and represents $2,000,000.00 capital and $2,174,439.69 surplus.

MORAL: Insure in The Travelers

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AMERICAN BAR ASSOCIATION
JOVRNAL

VOL. XVII APRIL, 1931 NO. 4

Committee on Unauthorized Practice of the Law Sends Out Questionnaire

THE Committee on Unauthorized Practice of the Law held a meeting in Chicago on March 3 and 4, at which all members were in attendance. It went into a full discussion of the activities of banks, trust companies, trade associations and other organizations of laymen which encroach on the field of the lawyer. In order to secure all available information on the subject committed to it by the Association for investigation, it decided to send a letter and questionnaire to the presidents of the various State and local Bar Associations. It further decided to hold its next meeting at Washington, D. C., on May 5, at the Mayflower Hotel.

The Committee on Professional Ethics and Grievances also held a meeting in Chicago at the same time and several joint sessions of the two committees were held to consider the question of lay encroachments. This committee will meet at Washington on May 4, 5 and 6, and there will then be further joint discussion in the light of information secured as a result of the questionnaire.

The following are the letter and questionnaire which have been sent out in accordance with the committee's instructions:

Letter to Presidents of State and Local Bar Associations

March 16, 1931.

Dear Sir:

Pursuant to a resolution adopted at the annual meeting of the American Bar Association at Chicago, a special Committee on Unauthorized Practice of the Law has been appointed. The Committee has been instructed to make an investigation of the practice of law by corporations and laymen, and of the relations existing between such corporations and laymen and the lawyers associated with or employed by them. Upon the completion of this investigation this committee will, jointly with the Committee on Professional Ethics and Grievances, consider the action that can be taken to protect the public against such improper practices and report to the Association.

For some years there has been constant complaint of the encroachment of corporations and laymen upon the practice of law, and of the conduct of the lawyers who have made such encroachment possible by the acceptance of employment from lay intermediaries to handle, under the direction of their employer, legal matters for third parties. Thus, collection agencies have appropriated a large part of the collection and bankruptcy business of the country. Associations, clubs and other organizations offer legal advice and service to their members without any charge save a membership fee. Banks and trust companies prepare wills and trust agreements and some do this without charge, employing lawyers for this purpose on a salary.

These conditions are the fault of the profession itself in allowing its members to accept employment to further such unauthorized practices. The sole inducement to the corporation and laymen to encroach upon the practice of law and to do law business is the compensation derived therefrom. To secure this legal business, recourse is had to the ordinary commercial, competitive methods of advertising and solicitation, thereby commercializing the profession of the law, undermining ethical and professional standards, and destroying public confidence in lawyers and the courts. A loss of confidence in lawyers and the courts is a sign of governmental decline and a forerunner of disintegration.

Naturally, lawyers have a selfish interest in this situation but there is involved in it a far more

serious question of public welfare which we, as lawyers, should squarely meet. If the encroachment of corporations and laymen is not checked, it is bound to increase, and, freed of restraints, it will ultimately destroy the profession and make it a commercial business. Although some may not view this prospect with alarm, it is indeed a serious matter and perhaps the most important problem that confronts the profession today. It is in the interest of society that the intimate and direct relationship of attorney and client shall be preserved. All thoughtful people know that the law practiced as a profession is a real protection to the public. The Bar, understanding and fully appreciating the evil effects not only to itself but to the public, that may and do arise from such unauthorized practices, is determined to prevent the commercialization of this great and noble profession which constitutes such a vital part of the administration of justice which is the highest and most important function of government.

In the fulfillment of the purpose for which this committee has been appointed and in the hope of bringing about a discontinuance of such practices, we respectfully request that you refer the enclosed questionnaire to the appropriate committee of your Association. In the event that you do not have a Committee on Unauthorized Practice of the Law, we ask that you appoint a special committee to prepare a reply to the questionnaire and also to cooperate with this committee in the future. We trust that we may have this reply by April 10th, so that it may be considered at our next meeting.

Yours very truly,

COMMITTEE ON UNAUTHORIZED PRACTICE OF THE LAW
JOHN G. JACKSON, *Chairman.*

The Questionnaire

A. Are any of the following engaged in the practice of law in your city, county or state? If so, underline same.—1. Banks and trust companies. 2. Collection agencies. 3. Trade organizations. 4. Credit associations. 5. Clubs and associations. 6. Title companies. 7. Mortgage loan companies. 8. Corporate organizers. 9. Adjusters. 10. Tax reduction bureaus. 11. Real Estate organizations. 12. Other organizations.

B. State the method used by each of the above that you have underlined.

C. State the manner in which lawyers assist corporations and laymen to practice law, or the manner in which such lawyers participate therein.

D. State what steps, if any, your Association has taken to check such unauthorized practices.

E. Give the citation of any statute of your state which relates to unauthorized practice of the law.

F. Give the name and citation of any case or cases which have been decided in your city, county or state relative to such unauthorized practices, including any unreported decisions of the lower courts.

G. Kindly give any suggestions, comments or views that you may have looking toward a solution of this important problem.

Return your reply promptly to Mrs. Olive G. Ricker, Executive Secretary, American Bar Association, 1140 North Dearborn Street, Chicago, Illinois.

The Committee on Unauthorized Practice of the Law is anxious to secure an expression of opinion, together with suggestions for a solution of the problems under consideration, from all members of the profession who are disposed to send them. Please address such communications to the Executive Secretary, American Bar Association, 1140 North Dearborn Street, Chicago.

The members of the Committee are as follows: John G. Jackson, Chairman, New York City; Charles A. Beardsley, Oakland, Calif.; Edward J. McCullen, St. Louis, Mo.; Stanley B. Houck, Minneapolis, Minn.; John R. Snively, Rockford, Ill.

Legislature Acts on Indiana's Bar Admission Problems

THE Indiana legislature, at the instance of the State Bar, has passed an act giving the Supreme Court exclusive jurisdiction to admit attorneys to practice law in that state. It will be recalled that the problem has heretofore presented special difficulties in Indiana because of a constitutional provision giving anyone of good moral character the right to practice law. This provision, however, has recently been considered in the light of an investigation of the minutes of the constitutional convention by Prof. Bernard Gavit of the University of Indiana, which resulted in the conclusion that it merely set forth a minimum requirement, and the new statute is apparently based on that view. We are indebted to Hon. William W. Miller, of Gary, President of the Indiana Bar Association, for the following communication on this subject:

"The readers of the JOURNAL will be interested in knowing that Senate Bill No. 162 has passed both houses of the Indiana State Legislature, and has been signed by the Governor. This bill was sponsored by the Indiana State Bar and designed to regulate admissions to the bar, transferring all powers of admission in the State of Indiana to its Supreme Court, which has power to prescribe rules and regulations. The Bar of the State of Indiana has made repeated efforts in the last thirty (30) years to change the constitutional provision with reference to admission to the Bar, but the voters have never manifested sufficient interest to carry the proposed change. An investigation by Prof. Gavit of Indiana University of the Minutes of the Constitutional Convention in 1850 disclosed the fact that the constitutional provision was intended by the convention only as setting forth a minimum requirement, thus permitting the Bar to impose more stringent requirements for admission. As the result of that investigation the Bar has caused the following bill to be passed:

"'A BILL FOR AN ACT CONCERNING ATTORNEYS AT LAW, GIVING THE SUPREME COURT EXCLUSIVE JURISDICTION TO ADMIT ATTORNEYS TO PRACTICE LAW IN ALL COURTS AND REPEALING ALL LAWS IN CONFLICT THEREWITH.

"'Be it enacted by the General Assembly of the State of Indiana:

"'SECTION 1. The Supreme Court of this state shall have exclusive jurisdiction to admit attorneys

to practice law in all courts of the state under such rules and regulations as it may prescribe.

"'SECTION 2. All laws or parts of laws in conflict herewith are hereby repealed.'

"It has been the custom for the past fifteen years in the counties where the larger cities are located to require an applicant for admission to the Bar to pass an examination unless he had a degree from a law school meeting the requirements of the American Bar, in which event the examining board might waive an examination. In this manner those unprepared were weeded out. Unfortunately this plan was not followed by all the counties of the state. Occasionally an applicant who lacked preparation was admitted in the counties that did not require an examination. The present law makes the entire state uniform and enables the Supreme Court to prescribe the necessary qualifications. The bill has the approval of the Attorney General, James Odgen."

Illinois Supreme Court Rebukes Legislative Interference with Judicial Functions

A STRIKING assertion and vindication of the judicial function, as against legislative attempts at interference, is contained in the decision of the Illinois Supreme Court in Bruner vs. The People of the State of Illinois, which came before it on a writ of error from the Criminal Court of Cook County. This decision, embodied in an interesting and able opinion by Mr. Justice De Young, declared the Illinois statute which provides that "Juries in all criminal cases shall be judges of the law and the fact," invalid on constitutional grounds.

In the lower court Judge Fisher refused an instruction based on the statute in question and gave one in a distinctly opposite sense as far as the exclusive power of the jury to judge the law is concerned. He said: "The jury is the sole judge of the facts in the case, the credibility of the witnesses, and of the weight to be given to their testimony. And, in anything that the court may have said throughout the trial or anything that the court may say in these instructions, the court has not intended and he does not now intend to express any opinion upon the facts of the case, on the credibility of the witnesses, or the weight to be given to their testimony. On the other hand, the court is the sole judge of the law in the case, and it becomes the duty of the jury to follow the law as it is given to it by the court in his instructions. You have no right to disregard it, or disregard any portion thereof, but you are bound to take the whole of it as it is given to you by the court and apply it to this case." The trial resulted in a conviction.

The defendant in error, Justice De Young's opinion states, justified "the refusal of the first and the giving of the second instruction on the ground that the statute which the plaintiff in error invokes contravenes (a) section 5 of article 2 of the constitution of 1870, that the right of trial by jury as heretofore enjoyed shall remain inviolate, and (b) the third article of the constitution which distributes the powers of the State government among the legislative, executive and judicial departments and prohibits the exercise, except as expressly directed or permitted, by any person or collection of persons constituting one of these departments, of any power properly belonging to either of the other departments."

An examination of the wording of the two previous constitutions of Illinois showed, in the opinion of the court, that the right of trial by jury guaranteed by them was the same as that guaranteed by the present constitution (1870). The modifications in procedure made by statute did not affect the substantial right so guaranteed, we are told, and the words "as heretofore enjoyed" were not intended to engraft such changes upon it. "The word 'heretofore' evidently relates to the past, and to determine the true meaning of the words 'the right of trial by jury as heretofore enjoyed' it is necessary to have recourse to the common law of England." An examination of the authorities of course left no doubt that the general principle that the jury must answer to questions of fact and the judges to questions of law was well established at the time of the American Constitution and that this "is the fundamental maxim acknowledged by the constitution."

Reference to a few of the leading cases, beginning with United States vs. Battiste, 2 Summer, 240, in which Judge Story rendered judgment, showed conclusively that the Federal courts of this country have recognized and applied this principle of the common law, and that "the great preponderance of authority in the courts of the several States likewise denies that by the common law, juries in criminal cases are the judges of the law." These authorities, said Justice De Young in concluding discussion of the first point, "amply show that by the common law, the jurors in a criminal trial had no right to decide any question of law, and that if they rendered a general verdict, their duty and their oath required them to apply to the facts, as they found them, the law as stated by the court. Section 11 of division 13 of the Criminal Code, which makes juries in all criminal cases judges of the law as well as the facts, therefore abrogates an essential attribute of the trial of a criminal case by a jury as known to the common law and results in the deprivation of a right which has been uniformly guaranteed by our successive constitutions."

The opinion then takes up the second point, viz: that the statute violates the third article of the constitution which provides that the powers of the government of this State are divided into legislative, executive and judicial departments and forbids any interference of one with the functions of another, except as expressly directed or permitted. It states that the judicial power is vested in a Supreme Court and certain subordinate courts by Section 1, Article 6 of the State Constitution, and adds that "the grant of judicial power to the department created for the purpose of exercising it is an exclusive grant and exhausts the whole and entire power. (People vs. Smith, 327 Ill. 11; People vs. Fisher, 340 id. 250.) Certain definitions of the judicial power are then given and followed by the statement that "if the power is judicial in its nature, it necessarily follows that the legislature is expressly pro-

hibited from exercising it. (In re Day, 181 Ill., 73.)" The opinion continues in part:

"The interpretation of statutes, the determination of their validity, and the application of the rules and principles of the common law, among others, are inherently judicial functions. The constitution vested these functions in the courts and not in juries called occasionally for a brief service of an essentially different character. (Commonwealth vs. Anthes, 71 Mass. 185; State vs. Wright, 53 Me. 328.) No provision for a trial by jury is made by the sixth article of the constitution. The right to such a trial is guaranteed by the bill of rights and when it is exercised, the jury's province is the determination of issues of fact and not of law. Francis Wharton, speaking upon this question in 1 Crim. Law Mag. 56, well said: 'Subject to the qualification that all acquittals are final, the law in criminal cases is to be determined by the court. In this way we have our liberties and rights determined, not by an irresponsible, but by a responsible tribunal; not by a tribunal ignorant of the law, but by a tribunal trained to and disciplined by the law; not by an irreversible tribunal, but by a reversible tribunal; not by a tribunal which makes its own law, but by a tribunal that obeys the law as made. In this way we maintain two fundamental maxims. The first is, that while to facts answer juries, to the law answers the court. The second, which is still more important is *"Nullum crimen, nulla pœna, sine lege."* Unless there be a violation of law pre-announced and this by a constant and responsible tribunal, there is no crime, and can be no punishment.

"If jurors are the judges of the law in a criminal case, then consistently their verdict in such a case cannot be contrary to the law and the trial judge has neither the right nor the power to set aside a verdict of guilty for that reason. If the legislative department may take from the courts and vest in juries the power to declare the law in a criminal case, then likewise the legislature may deprive the courts of the power to pass upon the sufficiency of an indictment, to determine the admissibility of evidence and to review a judgment of conviction. It will not be contended that such changes are within the competency of the legislative power."

Certain Illinois cases cited by the plaintiff in error to support his contention that the court erred in refusing the first and in giving the second instruction are met by the statement in the opinion that "in none of these cases was the validity of Section 11 of division 13 of the Criminal Code questioned and in no case has the statute ever been attacked upon the grounds urged in the case at bar." The opinion then concludes with the statement that "Section 11 of article 13 of the Criminal Code not only deprives a jury at common law of one of its essential attributes, but it also violates article 3 of the constitution and is void. The cases which have heretofore interpreted and applied the statute, to the extent that they conflict with this opinion, are therefore overruled," Mr. Justice Duncan dissented.

Proposed Bar Affiliation Plan for Missouri

"TO encourage the articulation of this Association with the American Bar Association" will be one of the objects of the Missouri Bar Association if the recent draft of a proposed new constitution is approved at the next annual meeting and accepted, by Jan. 1, 1932, by local associations representing counties having at least fifty per cent of the population of the State. The draft is the work of a special committee appointed by the President of the Missouri Bar Association and it was presented at the recent annual dinner given by the Association to the Supreme Court at Jefferson City.

However, affiliation of the State and local bar associations is the main idea of the proposed new constitution. The machinery embraces a membership of four classes: honorary members; affiliated members (to consist of the local bar associations themselves); regular members, which class shall consist of members of any affiliated local bar association as long as such association shall remain a member of the State organization in good standing; and individual members, who will be such present members of the State Association, or such as may hereafter be accepted to individual membership by the Executive, as are not members of a local association.

In furtherance of the local affiliation plan the draft provides that, immediately upon the adoption of the new constitution by the State Association, the Executive Committee shall take steps to advise the various local bar associations in the counties and judicial circuits of the means whereby they may become affiliated and invite them to do so. Acceptance of the proposal by a sufficient number by Jan. 31, as above stated, is necessary to put the plan into effect. Otherwise, the organization will continue to function under its present constitution. The dues of the affiliated members, that is, the local bar associations, shall be on the basis of three dollars a year for each member of such association, which sum shall include a subscription to the Missouri Bar Journal. The dues of regular members will be taken care of by such payments by the affiliated associations, while individual members will pay five dollars a year.

The provision for nomination of officers by a General Council—which will not, however, foreclose the right to make nominations from the floor—and certain other details are suggestive of the constitution of the American Bar Association. Among the committees provided for in the instrument, and indicative of interest in important present problems, are those on "Illegal Practice of Law by Laymen," "Judicial Candidates" (to consist of eight members equally divided between the two major political parties), and "Law Annotations to the Final Restatements of the American Law Institute." The special committee responsible for the draft is composed of George H. Moore, St. Louis, chairman, and Guy A. Thompson, Rush H. Limbaugh, Oliver T. Remmers, James E. Garstang, James E. King.

Bar Association-Bank Concordat in New Orleans

EFFORTS of the New Orleans Bar Association to reach an understanding with the member banks of the New Orleans Clearing House Asso-

ciation with respect to the activities of their trust departments resulted in the acceptance, by the latter, on Dec. 17, 1930, of cerain resolutions adopted by the Bar Association on Oct. 31 of the previous year. The resolutions in question are as follows:

RESOLVED: The New Orleans Bar Association, recognizing the mutual benefits of harmonious cooperation of the banks and bar in this City, recommends to the banks acting through the New Orleans Clearing House Association, the adoption of and faithful adherence to the following rules and practices in respect of the operations of the Trust Departments of said banks:

First: Under no circumstances

(a) Shall a bank advertise that it will, in respect of any legal matter, give, or in fact give, through its officers, agents or attorneys, any advice or opinion, or invite or promote consultation with its officers, agents or attorneys to that end by any person, firm or corporation;

(b) Shall a bank advertise that it will furnish, or in fact furnish, opinions or advice of its officers, agents or attorneys as to the interpretation, scope, effect or legality of any law or court decision or legal document;

(c) Shall a bank advertise that through the services of its officers, agents or attorneys it will draft or prepare, or assist in the drafting or preparation, or in fact draft, prepare or assist in the drafting or preparation of any will, contract or other legal document;

(d) Shall a bank publish or distribute for general circulation and information of the public, forms of wills, trust agreements, contracts or other legal documents;

(e) Shall a bank, by advertisement or otherwise, solicit, or request or suggest the employment or retainer of the attorney of the bank in any such matters;

(f) Shall a bank extend, by advertisement or otherwise, an invitation to the public to bring its legal problems to the bank.

Except that:

(1) A bank may advertise that upon application it will furnish, and may furnish to prospective customers copies of trust agreements, deeds or other legal documents or opinions of its counsel relating to bonds or securities offered by it or purchasable through it; and may freely furnish to licensed attorneys-at-law copies or drafts of trust agreements, deeds, wills and other legal documents which may be of assistance to them in the preparation of similar documents, and cooperate through its officers, agents and attorneys in every respect with attorneys-at-law in relation to any matters coming within the scope of its Trust Department;

(2) A bank may undertake to have, and may have its attorneys, at its own expense (which expense may be reimbursed to it), pass upon or express an opinion as to the legality, or as to the provisions of any existing legal document to which it is, or to which it is requested to become a party; or in which it has or may have interest.

(3) A bank may, if so requested, but without solicitation or suggestion on its part, recommend its counsel to any person, firm or corporation desiring legal advice or service, but in the event the attorney of the bank is retained for such services, he shall be entitled to compensation by such person, and must charge for such services in accordance with custom or the rules of the New Orleans Bar Association if such attorney is a member of said Association.

(4) A bank or trust company may bring attention to the of the public by any form of advertising, including the issuance of booklets, circulars or personal letters, that it is legally authorized to act in any capacity permitted by law. Such advertising may stress the advantage of making wills, creating trust estates, appointing trustees, executors, curators, etc., trusteeing of life insurance under trust agreements, the creating of living trusts, etc., and may, in seeking its appointment in any permitted capacity, stress its particular resources, such as its capital stock and surplus, its large organization and its experience resulting from its years of operation. While it may in such advertising matter print resumés or digests of laws or jurisprudence, it should always clearly recognize therein the line of demarcation which separates the practice of law from the pursuit of an employment in a fiduciary capacity, and should avoid the expression of any opinion as to the legality, scope, application or interpretation of such laws or decisions.

Second: No prohibition herein contained shall apply to loans, bond issues or similar transactions, when the bank has a pecuniary interest other than that solely for a fiduciary interest.

Third: If any bank shall be in doubt as to the legality of any action or proposed action on its part in relation to the conduct of its trust business, it shall be at liberty to submit, through its officers or attorneys, the question to the Executive Committee of the New Orleans Bar Association, to the end that the judgment of that Committee may be had upon the matter.

Economic League Council Votes Prohibition Most Important Pending Problem

BY a recent vote of the members of the National Council of the National Economic League, Prohibition is declared to be the most important problem before the country today. The National Council, as has been stated previously on several occasions in this department, is made up of leading men in all parts of the country, representative of the various professions and occupations. Its views as to the relative importance of present problems are generally regarded as significant.

Prohibition led in the importance of subjects with a vote of 1,871. The votes given other subjects were: Administration of justice, 1,750; lawlessness, disrespect of law, 1,514; unemployment, economic stabilization, 1,434; law enforcement, 1,398; crime, 1,314; World Court, 1,106; taxation, 966; world peace, 879; efficient democratic government, 708; agriculture, farm relief, 694; political corruption, 647; tariff, 624; reconsideration of war debts, 555; government in business, 529; international economic relations, 510; foreign trade policy, 464; reduction and limitation of armaments, 462; socialism, communism, 460; League of Nations, 456; conservation of natural resources, 442; law revision, State and Federal, 419; revision of anti-trust laws, 392; education, 391; centralization of money and power, 387; child welfare, 386; cooperation vs. competition, 382; moral and ethical standards, 382; State rights, 372; individual liberty, 362; election laws, 353; old age pensions and insurance, 350.

Other subjects voted on, which received less than 350 preferential votes were: Immigration, 338; Russia, 333; motor traffic regulation, 322; consolidations and mergers, 315; citizenship, 310; relations between capital and labor, 306; social and economic readjustment, 303; public utilities, 301; railroads, 280; stabilization of the value of money, 263; thrift, extravagance, 256; finance, banking, currency, credit, 244; group banking, 239; national defense, 218; penology, prison reform, 216; freedom of speech and of the press, 213; speculation in stocks and foodstuffs, 200; public health, 198; marriage and divorce, 197; eugenics, 170; industrialism and agriculture, 139; governmental principles and policies, 117.

Members of the Executive Council of the league are Charles G. Dawes, former vice-president; John Hays Hammond, engineer; Dr. David Starr Jordan, former head of Stanford University; James R. Angell, president of Yale University; George W. Wickersham, A. Lawrence Lowell, president of

Harvard University; Edward A. Filene, Dr. Nicholas Murray Butler, Harry A. Garfield, president of Williams College; Silas H. Strawn and J. W. Beatson.

Survey Condemns Grand Jury System

THE grand jury system is attacked as a fruitful cause of delay in the administration of justice, a source of official bluffing and bargaining between prosecutor and defendant, and as a mere "rubber stamp" for the prosecuting attorney in a report based on a recent national survey of the system in operation, according to an article in the New York Times. The report was issued by Prof. Raymond B. Moley, of the Law School of Columbia University, and the survey was financed by a grant from the Social Science Research Council and conducted under the auspices of the Legislative Drafting Fund of the University.

The report pointed out that the grand jury system is retained in twenty-four states. It compared data concerning major criminal operations in four of these states with the results in four of the states in which, with minor exceptions, criminal action may be started by information, much to the disadvantage of the former. "Surveys in New York and Illinois," according to the report, "make it quite clear that one of the most serious causes of delay is the wait for grand jury action. In New York the medium time interval during which cases waited for the grand jury was twelve days in New York City, twenty-nine days in the six cities next in size, and thirty-seven days for the rural parts of the State." In Pennsylvania it was found that it took fifty-six days to try the average criminal cases, of which forty were consumed by the wait for grand jury action. The practice of charging one crime in the indictment and then accepting a plea to a less serious one was found most commonly in New York and Illinois.

States permitting information instead of indictment, the report said, presented a marked contrast. In Missouri the prosecutor was found to require only nine days for filing the information out of a total of forty for the entire trial. What is more, the proportion of convictions in the "information" states was found to be decidedly higher. "To prove the grand jury largely a 'rubber stamp,'" says the Times account of the report, "Dr. Moley recorded cases handled by 162 prosecutors in all but two of the grand jury States. In 95 per cent of 7,414 cases the prosecutor's opinion coincided with the action of the grand jury. The latter body, according to the report, thus provides an avenue by which the prosecutor may escape responsibility for action over which he really exerts a dominant influence." The conclusion and recommendation of the report is of course that the grand jury system be abolished.

American Academy of Air Law Organized

FRANK H. SOMMER, dean of the New York University School of Law, announces that a national organization—The American Academy of Air Law—had been formed as a medium for coordinating the now uncoordinated efforts of organizations and individuals interested in the rational development of aviation and radio law. "While New York University School of Law," said Dean Sommer, "has initiated the Academy's organization, the Academy is entirely independent of the University. Under the internal organization of the Academy, any educational institution, industrial or commercial organization, or individual, interested in the development of a comprehensive national air law program, may become a member on an equal basis. The organization of the Academy is the first attempt to unite all those interested in an effort, national in scope, to promote the study and to influence the sound development of air law. Its broad membership, including practitioners of law and men of business, assures that in consideration and action with relation to aviation and radio law, practical effects will be given due weight.

"The purposes of the Academy, as stated in the Article of Incorporation, are: To establish and maintain a library on aeronautical and radio law; to encourage research and provide facilities for the study of aeronautical and radio law, including instruction therein; to provide the means for education and social intercourse between persons and organizations engaged in the study of aeronautical and radio law; to develop a sound and enlightened opinion on the legal aspects of aeronautical and radio problems on the part of the public and the agencies of government; to prepare, print and issue publications, periodicals and information on aeronautical and radio law and to act as a clearing-house for the collection and dissemination of information pertaining thereto; to promote regional, national and international conferences on air law."

The Academy will act as a national agency for scientific research and investigation of the many new phases of legal problems presented by aviation and radio. Such research will be conducted at the several educational institutions joining in membership in the Academy. At New York University School of Law, research in aviation law will be under the direction of Mr. Harry J. Freeman, teaching research fellow and assistant editor of the "Air Law Review," and research in radio law will be under the supervision of Professor Russell Denison Niles; at Catholic University of America School of Law, research will be under the direction of Professor James J. Hayden. The results will be published from time to time in the "Air Law Review," the first American publication to cover the legal aspects of these two new fields. The "Air Law Review" is edited by Professor Alison Reppy, who is the Executive Director of the Academy.

Survey of Administration of Criminal Justice in Oregon

A PRELIMINARY report on a "Survey of the Administration of Criminal Justice in Oregon," conducted by the University of Oregon School of Law, was recently presented to the Governor and the members of the Legislature. It was prepared by Survey Director Wayne L. Morse, Associate Professor of Law, and by Assistant Director Ronald H. Beattie, Research Fellow. The Report states that "in view of the limited funds available, the directors of this study decided to confine

the first year's work to a statistical study of the disposition of felony cases in Multnomah county for the years of 1927 and 1928. It is hoped that similar studies can be conducted in several other counties to be selected in proportion to population, so as to give a cross-section picture of the disposal of felony cases throughout the state, thus providing a basis for comparisons. Such studies show what happens to felony cases which pass through our legal machinery and they enable us to understand better the operation of our criminal law administrative system. In conducting the survey, all the cases were studied from the point of arrest to the point of final disposition."

A novel feature of the Oregon survey will be the collection of criminal data so as to show the differentiation between the sexes, information which is of course significant in an analysis of the operation of the criminal law machinery. A table in the preliminary report gives the felony charges on arrest classified by sex, and the following comment is made on the figures:

"While there were only one-tenth as many female cases as male cases, still certain sex differences are to be noted as to the types of felonies charged. There is a larger percentage of robberies, burglaries, assaults and sex crimes charged against the males in proportion to their total number of charges than against the females. However, there is a larger percentage of larcenies, forgeries and liquor violations charged against the females in proportion to their total number of charges than against the males.

"In interpreting the tables as to sex differences, it should be remembered that the number of cases represents the total number of felony charges, both male and female, in Multnomah county for the calendar years 1927 and 1928; therefore there was no biased selection of data. Since the number of female cases is so much smaller than the number of male cases, conclusions can be deduced from the former with less accuracy than from the latter. Both groups, however, are complete samples and therefore furnish 'the most probable values' in their respective classifications. Comparative deductions on the basis of small samples should be made cautiously until more exhaustive statistical treatment can be applied. After this study has been extended to several other counties, it will be interesting to learn whether or not the same sex differences persist."

This is followed by a table giving the disposition of felony charges, also classified by sex, which shows that a greater proportion of the female cases was eliminated in police custody and in the preliminary hearing than the male cases—61.4 per cent of the former and 52.7 per cent of the latter being disposed of during the first two steps. The grand jury continued this predilection for the female over the male by eliminating 14.1 per cent of the female cases which got to it as against only 7.6 per cent of the male cases. "The eliminations in the circuit court of Multnomah county," we are told, "show about the same percentage for each of the sexes, but an examination of the cases that went through to conviction reveals that less than 10 per cent of the original female cases remained until this final step, while nearly 25 per cent of the male cases reached this point."

"The main findings of the survey as it has thus far progressed can be summarized as follows:

"1. The various departments entrusted with the administration of criminal law acted more or less independently of one another.

"2. This situation resulted in a lack of unity in the record system in use in the different departments of criminal law administration in Multnomah county.

"3. Only a small percentage of the total number of felony charges on arrest went through the judicial process to felony conviction.

"4. Over half of the felony charges on arrest were eliminated in the preliminary hearing stage.

"5. The study showed marked differences between the sexes in the disposition of cases. Women, throughout the various steps, were shown greater leniency than men.

"6. There was a marked tendency to reduce many felony charges to lesser charges.

"7. Forty per cent of the crimes covered by the study were committed by offenders under the age of 25.

"8. The study shows that the foreign element in Multnomah county was not charged with as many felonies in proportion to their total population as the group designated as U. S. whites.

"9. Of the cases convicted of felonies in the circuit court, 58.5 per cent resulted in unmodified sentences to penal institutions.

"10. In the disposition of the 1,771 original felony charges on arrest in Multnomah county for the years 1927 and 1928 the petit jury played an insignificant part. Even in the disposition of the 678 cases that entered the circuit court, the petit jury disposed of only 76.

"After a comprehensive study of crime and the administration of criminal justice in Oregon has been made, our law-makers and our officials entrusted with the administartion of criminal law will be able to attack the crime problem in a scientific and objective manner. It is hoped by the directors of this study that the necessary funds will be made available so that a group of social scientists can undertake such a survey and thereby perform this service for the state of Oregon."

Unauthorized Use of Name

To the Editor of the
AMERICAN BAR ASSOCIATION JOURNAL,
1140 North Dearborn Street,
Chicago, Illinois.

Dear Sir:

I have been informed that subscriptions from lawyers to one or more publications or bureaus are being solicited with the representation that it is with my approval and by my authority.

Will you kindly publish this letter in the JOURNAL. No person representing any publication of any kind has received my authority or approval for the solicitation of any subscription whatsoever.

CHARLES A. BOSTON,
President of American Bar Association.

New York, March 10, 1931.

THE UNIFORM CLASSIFICATION OF OFFENCES

Extent and Thoroughness of the Task Performed in Evolving a System That Provides a Working Solution of an Old Familiar Problem—Classes Finally Adopted—Government Now Collecting Statistics on Crime Volume for First Time in History

By Audrey M. Davies

Of the National Institute of Public Administration, New York City

FOR the first time in its history the United States government is collecting, compiling, and publishing statistics on the volume of crime throughout the Country. The most recent number of the monthly Bulletin of crime statistics issued by the Bureau of Investigation of the United States Department of Justice contains reports from each of the forty-eight states in the Union, and the District of Columbia, as well as from the major outlying possessions. These reports are in the form of returns submitted to the chiefs of police of individual cities to the national collecting agency. The last Bulletin—for December, 1930—showed an average representation of 21 cities per state. The actual representation varied from one city each in the states of Delaware, Idaho, New Mexico and Wyoming, to 98 municipalities in the state of New York. Altogether, 83 per cent of all cities in the country of 25,000 or more inhabitants is represented, including 89 per cent of the larger cities or cities of 100,000 population and over. In addition, an appreciable number of smaller places are reporting, together with a few strictly rural areas.

While this is still far short of the entire population, it means that approximately three-fourths of the population of the crime breeding areas of the country is represented. As the rate of crime is proportionately high in densely populated urban centers, and dwindles rapidly where the population is sparse, it may be taken that the crime figures for three-fourths of the large city populations are fairly indicative of the situation for the country as a whole.

It is not so long ago that such an extensive system of crime reporting would have been an impossibility. So inherent seemed the obstacles to be overcome, that even now protests are sometimes heard that the impossible is being attempted. This is because the extent and thoroughness of the task that was performed in evolving a system that provides a working solution to the old familiar problems is not as yet fully comprehended.

A fundamental difficulty involved in the collection throughout the United States of crime statistics of any sort is created by our dual system of government, under which matters of national import are consigned to federal authority, while those of local concern are divided among forty-eight separate local state jurisdictions. Crimes consequently may be segregated into those against the federal authority and those against each and any of forty-eight local governments. Considering at this time only the latter group, to which may be added the District of Columbia, there are thus forty-nine separate and distinct sets of laws, the violation of any and all of which constitutes the sum total of the major body of crime in the country. Without determining the precise extent of agreement or difference between these sets of laws, it is the fact that there is no exact correspondence between them. This is another way of saying that there is no common foundation on which to build.

This was the problem which confronted the Committee on Uniform Crime Records of the International Association of Chiefs of Police, entrusted in 1927 with the task of constructing a system of crime statistics on a national scale. How could uniformity be effected? The adoption of uniform definitions by all the states is an ideal that may sometime be worked out, and the work of the American Law Institute so far as it has progressed with the restatement of the law and the Model Code of Criminal Procedure brings such a goal at least within the range of possibility. Its attainment, unfortunately, if not purely conjectural, must of necessity be consigned to a somewhat remote future. Meanwhile, in the absence of authenticated data, irresponsible and distorted views of the crime situation will continue to circulate unchecked, with the reputation of the country for law-abidingness constantly at stake, both at home and abroad.

The committee adopted the alternative expedient of attempting to reconcile differences and discrepancies as they appeared on the statute books and in judicial decisions. The task was not easy, nor is it claimed to be free from imperfections in execution. From the legal standpoint, there were the intricacies of technical legal doctrine to be faced. On the other hand, simplicity and ease of operation were essential to the successful functioning of the system. The almost unbelievable diversity in the wording and meaning of the statutes, often incoherently and incompletely expressed, was another complicating factor.

As the work progressed, it became apparent that for various reasons not all criminal offenses should or could be subjected to treatment of this sort. In some few instances, the definitions were so divergent that the lack of a common element prevented the establishing of any uniform definition. Certain types of offenses, while defined with some degree of uniformity on the statute books, were of such a nature that it was quickly recognized that any figures that might be collected would be seriously incomplete, and correspondingly misleading. Knowledge of the commission of such offenses

would be kept between the perpetrator and the victim; reasons for their concealment would outweigh motives for revealing them. Infrequency of occurrence deprived some otherwise serious offenses of their importance for statistical purposes. The mere pettiness of the less serious offenses made it certain that the number known and reported would fall far short of the total actually committed. Certain statutes of a regulatory nature appeared in some states and were entirely absent in others—besides being somewhat beside the purpose. Even acts less questionably wrong *per se* were conspicuous for unevenness of recognition in the statutes.

The offenses studied fell rather naturally therefore into two distinct groups. The first included those which from their very seriousness, their recognition by every state, and the frequency of their commission might be regarded as affording a measure or index of the degree of criminality at any given time, and from time to time. They were also those where no element either of disgrace or ridicule attaches to the victim, so that in all likelihood the majority of cases would at once be made known or reported. The second group consisted of all other offenses found in the statutes. The two together constitute Part I and Part II of the Uniform Classification of Offenses.

Part I Classes of the Uniform Classification

The offenses selected as the basis of a uniform classification, upon which a national system of statistics might be erected, were grouped under the following designations, referred to as Part I Classes:

1. Felonious Homicide—
   (a) Murder and Non-negligent Manslaughter.
   (b) Manslaughter by Negligence.
2. Rape.
3. Robbery.
4. Aggravated Assault.
5. Burglary—Breaking or Entering.
6. Larceny—Theft—
   (a) $50 and Over in Value.
   (b) Under $50.
7. Auto Theft.

The criminal statutes of the forty-nine jurisdictions were examined. Regardless of their place or location or designation in the statute books, offenses having certain elements in common were classified together. The characteristic elements of each of the classes and sub-classes listed above were determined from an analysis of all the statutes. With many deviations, still it was found that in a majority of the states these were the elements which were required by statutory definition to constitute the above offenses. Little difficulty arose where the crime was completely defined and a penalty stated. But in many instances either no definition was given, but only the name of the offense and its penalty, or the offense was incompletely defined. In such case resort was had to judicial decision for the definition. In nearly every state a series of other provisions and penalties followed the definition or name of the offense, applying it to specific circumstances or conditions. These specific applications have been grouped under the general definition of the offense from which the "class" derives its name. On the other hand, provisions were found in many instances which were classified in the statutes under one or other of the above classes, but which wholly lacked the elements determined from analysis to be essential to the offense. Such provisions were removed from the particular class, and either transferred to the class to which they properly belonged, or omitted entirely if not within any of the designated classes.

All statutory offenses in a particular state found to be within these classes were listed together, following after the general definition of the offense as found in the statutes or from the decisions. All statutory offenses designated by the class name in the statutes but found to lack the elements essential to that class were also listed, under the instruction "Omit." These lists of the statutory offenses which comprise the Part I Classes for each state, together with the necessary omissions, constitute a working schedule for the particular state. It follows that no state will have included under its schedule any offense that has not the elements common to that offense in all the other states. Statistics based on returns compiled with reference to such schedules must accordingly have a degree of uniformity otherwise unattainable.

A word may be said as to the class titles chosen. These were dictated by practical expediency. The inherent difficulty in singling out in all instances the elements which separated murder from voluntary manslaughter made it impracticable to endeavor to keep the two apart. Even were there no diversity in the statutes as to the elements constituting each, the circumstances at the time of commission often do not furnish sufficient evidence for a quick correct classification of the offense, other than as a "felonious homicide" of some sort. Moreover, they are sufficiently akin in quality to warrant classification together, so far as they are to be taken as an index to criminality; it is chiefly with respect to punishment that the legal distinction between them becomes significant. Manslaughter by negligence, on the other hand, is a vastly different type of offense and should be differentiated from crime of so much more significant a character.

Rape and robbery follow the common law definitions of these offenses, with the exception of certain statutory modifications in the case of rape with regard to the age of consent—which, incidentally, are so diverse as to make it the least satisfactory of all the Part I Classes.

Aggravated assault is the most artificial of the classes. There are possibly less than half a dozen states that use this term at all, and then not in the sense that it is used in the classification. It covers all cases of assault of a degree likely to cause death or severe bodily injury, such is customarily involved in an assault with intent to kill. While the term is not current in the statutes, practically every state has statutes covering offenses of this sort, and the term was chosen for want of a better one.

The compound term of burglary—breaking or entering was designed to cover all the modifications of the common law conception of burglary which have crept so extensively into the statutes. Thus, from *breaking* and entering, in the *night* time, the *dwelling house* of another, with intent to commit a

felony, the offense is now quite generally extended by statute to include *any* unlawful *entry* of practically *any* structure, with such intent.

Larceny-theft was chosen to accommodate those few states which in recent years have done away with the designation "larceny" altogether and have substituted the term "theft." This class presented more difficulties from both the theoretical and practical standpoint possibly than any of the others. Even at common law the distinction between larceny and certain kindred offenses—embezzlement, fraudulent conversion, frauds and false pretenses—was often a highly artificial one. The modern tendency in the statutes is to get away from this condition by grouping together larceny and all frauds—sometimes under the general term "theft." But this benefit in one directoin is gained at the expense of certain practical considerations which should not be lost sight of. It confuses two dissimilar types of criminal offender, for the perpetrator of a fraud or the person who succumbs to the temptation of retaining property entrusted to him is obviously actuated by different impulses from a so-called "common thief's." The circumstances alone may determine which is better or worse, but they are at any rate different. Also, for various reasons, the victims of frauds, tricks, or embezzlements are often not anxious to publish the fact. Fear of ridicule, or sympathy with the offender, who has often been in a confidential relationship, may act as a restraint. No such inhibition operates in the case of a common theft; on the contrary, the greater the publicity the more likelihood there is that the thief will be discovered. For these reasons, it has been attempted in the classification to restrict this offense to common stealing, much as at common law, and with due recognition of the fact that the objects which may be the subject of larceny have been considerably expanded by statute. This has often necessitated dividing a statute into sections and listing part under the definition of the offense and the rest under "Omit."

Larger and smaller thefts have been divided arbitrarily at $50, that some indication may be had of the number of more significant offenses in this class.

Auto theft is simply a special instance of larceny-theft. The characteristics and extent of this offense justify a separate classification. The difficulty of ascertaining the intent in these offenses —and intent is an important element of larceny— has made it necessary to add some rather arbitrary qualifications; so that a mere taking and abandoning without any attempt to restore the vehicle to the owner is sufficient to constitute the offense, whether or not the taker intended to deprive the owner permanently of possession.

It is evident from the foregoing that the schedules only provide an approximation to uniformity. There are many gaps, due to the incomplete and otherwise unsatisfactory condition of the statutes, though an effort has been made to fill them in by general direction or specific instruction wherever possible. There is also the objection that legal definitions are beyond assimilation by police officials, for whose use the schedules are primarily intended. But there is much in their favor. They do not disarrange the existing order of things, more exactly, of statutes, by requiring new legislation, and additional legislation from time to time can be classified and inserted as fast as is deemed expedient. They consist of the same code provisions and terminology with which the police are assumed to be familiar. Moreover, they deal with offenses which are for the most part easily recognizable, so that a little practice with the names of the offense classes and reference to the general definitions should ensure substantial compliance with the requirements of the schedules.

Part II Classes

For reasons already mentioned, the Part II Classes of the Uniform Classification have not been reduced to schedule form. While it is quite impracticable to utilize them as a measure of the number of offenses committed, it is still highly important to know how many people are charged with these crimes and to collect data concerning such people. A study of the statutes has suggested a certain classification of these offenses and arrangement of the statutes pertaining to them which substantially serve the purpose and provide whatever degree of uniformity is available. The classes are numbered consecutively, as a continuation of Part I Classes, and are as follows:

8. Other Assaults, inclusive of:
   - Simple assault
   - Assault and battery
   - Pointing a gun in jest
   - Injury caused by culpable negligence
   - Intimidation
   - Coercion
   - Resisting or obstructing an officer
   - Hazing
   - Wife beating
   - Drawing a dangerous weapon
   - All attempts to commit the above
9. Forgery and Counterfeiting, inclusive of:
   - Altering or forging public and other records
   - Making, altering, forging, or counterfeiting bills, notes, drafts, tickets, checks, etc.
   - Forging wills, deeds, notes, bonds, seals, trademarks, etc.
   - Counterfeiting coins, plates, bank notes, checks, etc.
   - Possessing or uttering forged or counterfeited instruments
   - Erasures
   - Signing the name of another or fictitious person with intent to defraud
   - Possession, manufacture, etc., of counterfeiting apparatus
   - Using forged labels
   - Selling goods with altered, forged or counterfeited trademarks
   - All attempts to commit the above
10. Embezzlement and Fraud, inclusive of:
   - Embezzlement
   - Fraud
   - "Confidence game"
   - Fraudulent conversion, appropriation, conveyance, entries, accounts, registration, use of trademarks or emblems, misbranding, etc.
   - False personation, pretense, statement, document, representation, claims, evidence, etc.
   - Gross fraud, cheat, or swindle
   - Check frauds; drawing check without funds, etc.
   - Fraudulent use of telegraph, telephone messages
   - Insurance frauds
   - Use of false weights and measures
   - False advertising
   - All attempts to commit the above
11. Weapons; Carrying, Possession, etc., inclusive of:
   - Manufacture, sale, or possession of deadly weapons
   - Carrying deadly weapons, concealed or openly
   - Using, manufacturing, etc., silencers

Furnishing deadly weapons to minors
Bringing weapons into state prisons
Aliens possessing deadly weapons

12. Sex Offenses (except rape), inclusive of:
Abduction and compelling to marry
Abortion
Adultery and fornication
Bastardy and concealing death of a bastard
Bigamy and polygamy
Buggery
Incest and marriage within prohibited degrees
Indecent exposure
Indecent liberties
Intercourse or marriage with an insane, epileptic, or venereally diseased person
Miscegenation
Prostitution and keeping bawdy, disorderly house, or a house of ill fame
Pandering, procuring, transporting, detaining, etc., women for immoral purposes
Seduction
Sodomy or crime against nature
All attempts to commit any of the above

13. Offenses Against the Family and Children, inclusive of:
Desertion, abandonment, or nonsupport of wife or child
Neglect or abuse of child
Encouraging or contributing to delinquency of minors
Employment of children in injurious, immoral, or improper vocations or practices
Admitting minors to improper places
Nonpayment of alimony
All attempts to commit any of the above

14. Violating Drug Laws (federal offenses except), inclusive of:
Unlawful possession, sale, etc., of narcotic drugs
Bringing drugs into state prisons, hospitals, etc.; furnishing to convicts
Keeping or frequenting an opium den
Habitual users
All attempts to commit any of the above

15. Driving While Intoxicated, inclusive of:
Operating a motor vehicle while intoxicated
Operating an engine, train, street car, steamboat, etc., while intoxicated

16. Violating Liquor Laws (Class 15, Class 17, and federal offenses excepted), inclusive of:
Manufacture, sale, transporting, furnishing, possessing, etc., intoxicating liquor
Maintaining unlawful drinking places
Advertising and soliciting orders for intoxicating liquor
Bootlegging
Operating still
Bringing liquor into state prisons or hospitals; furnishing to convict or prisoner
Furnishing liquor to a minor or intemperate person
Using a vehicle for illegal transportation of liquor
Drinking on train or public conveyance
All attempts to commit any of the above

17. Drunkenness, inclusive of:
Drunkenness
Drunk and disorderly
Common or habitual drunkard
Intoxication

18. Disorderly Conduct and Vagrancy, inclusive of prosecutions on the charge of being a "suspicious character or person, etc.," and the following:
Riot, rout, or affray
Unlawful assembly
Disturbing the peace
Disturbing meetings
Disorderly conduct in state institutions, at court, at fairs, on trains, or public conveyances, etc.
Disguised and masked persons; night riders
Prize fights
Blasphemy, profanity, and obscene language
Desecrating flag
Refusing to assist an officer
Vagrancy, begging, loitering, vagabondage
All attempts to commit any of the above

19. Gambling, inclusive of:
Keep gambling devices
Common gamblers
Owning gambling resort
Frequenting gambling resort
Lotteries
Gambling in any manner

20. Violating Traffic and Motor Vehicle Laws, inclusive of all violations of state laws and municipal ordinances with regard to traffic and motor vehicles, except "Auto Theft" (Class 7), and "Driving While Intoxicated" (Class 15).

21. All Other Offenses, inclusive of every other state or local offense not included in Classes 1 to 20 above, such as:
Arson
Assisting another in the commission of self-murder
Blackmail and extortion
Breaking or entering other than with intent to commit a felony or any larceny
Bribery
Buying or receiving stolen property
Combination in restraint of trade; trusts; monopolies
Conspiracy
Contempt of court
Criminal anarchism
Criminal syndicalism
Discrimination; unfair competition
Unlawful disinterment of the dead and violation of sepulture
Displaying red or black flag
Forcible entry or detainer
Kidnapping
Malicious mischief and injury to property
Prejury and subordination of perjury
Possession, repair, manufacture, etc., of burglar's tools
Possession, sale, etc., of adulterated drugs (non-narcotic)
Possession or sale of obscene literature, pictures, etc.
Public nuisances
Trespass
Unauthorized use of motor vehicles, animals, etc.
Unlawful use, possession, etc., of explosives
Violations of state regulatory laws and municipal ordinances (this does not include those offenses or regulations which belong in the above classes)
Violation of parole
Violation of quarantine
All other offenses not otherwise classified
All attempts to commit any of the above

22. Suspicion: While "suspicion" is not an offense, it is the ground for many arrests in those jurisdictions where the law permits. After examination by the police, the prisoner is either formally charged or released. Those formally charged are entered in one of the above offense classes. This class is limited to "suspicion" arrests which are released by the police before any formal charge has been filed.

Federal Offenses

Federal offenses consist of violations of federal regulatory acts, and offenses over which the federal government has territorial jurisdiction. There is nothing to prevent a classification of federal offenses in accordance with the principles of Part I and Part II Classes of the Uniform Classification. Moreover, the collection of such statistics by a national agency would obviously not be subject to some of the impediments to satisfactory collection from forty-eight independent jurisdictions. With a view to the day when crime reporting will have attained a hundred per cent registration area, such additional classification and collection should not be deferred.

It is not proposed at this time to take up other aspects of the uniform system: the use of uniform records, the honesty and accuracy of the returns, the collection of additional social facts, the functioning of state crime bureaus, and other questions of great interest and importance. The plan is now in its second year of operation, and the cooperation received, the phenomenal growth of the crime registration area, the earnest endeavors to conform to the requirements of the classification, and the important service the statistics are commencing to perform in breaking down old misconceptions of crime volume and distribution, more than justify the expectations of those first conceiving the possi-

bilities of the plan. There is still pioneer work to be done in developing the extent of operation and improving the quality of the data received. These are matters that require time, training, and facilities for performance. But when criticism and perhaps condemnation are being indulged in, it may not be inopportune to offer a reminder that the miracle is that we have uniform crime statistics at all, and at the same time to point to some of the features that tend to substantiate the claim.

DEPARTMENT OF CURRENT LEGISLATION

Criminal Statutes in 1930

BY JOSEPH P. CHAMBERLAIN

NINETEEN-THIRTY was a short legislative year. The few legislatures in session, however, dealt with a wide range of subjects affecting the criminal law, including the usual list of statutes applying a criminal penalty to business misdeeds. There was a rather unusual concensus in favor of wide latitude to courts in fixing penalties. A novel instrument of crime, infernal machines, makes its bow to the statute-reading public, and there are several efforts to turn the flank of the army of those who unlawfully annex other people's property.

The most interesting statute dealing with treatment of criminals is the New York act liberalizing the parole law and especially being liberal with the salaries of the enforcement officials, an interesting method of securing efficient enforcement. In procedure, one state permits waivers of jury trial and another softens statutory rape by allowing proof of bad character of the prosecuting witness. Yet another state sets up a criminal identification bureau, thus giving another link in the national chain heading in the bureau in the Department of Justice at Washington, officially sanctioned by Congress in Public 337 of 1930.

Treatment

New York, 824,[1] has taken a long step forward in its treatment of paroled prisoners. It has set up a new board of parole of three members as head of the Division of Parole in the Department of Correction, in place of the single commissioner, and to it is given jurisdiction over applications for parole in all the prisons in the state. Boards of parole are not uncommon, but a distinguishing mark of the new system in New York is the payment of a salary of $12,000 and expenses to each member. The members are appointed by Governor and Senate for overlapping terms of six years, to keep them as far as possible from politics and to insure a certain continuity in their policy. The Governor designates the first chairman, but his successors are elected by the board itself. Members of the board may be removed by the Governor for cause after an opportunity to be heard. They must give their whole time to the discharge of their official duties, and it is expressly provided that they shall not, at the time of appointment or during their incumbency, serve on the executive committee of any political party or as an executive officer or employee of any political organization. The board must meet at each institution to act on applications. In addition to having jurisdiction to grant parole, the board has continuing jurisdiction over paroled prisoners to determine delinquency in all cases of alleged violations of parole. In addition to its management of parole, the board collects information and makes reports to the Governor on applications for pardon or commutation of sentence and for restoration to citizenship. It is expressly directed not only to investigate criminal records, but also the social, physical, mental and psychiatric condition of prisoners released under its supervision, and one of the principal activities of the executive director is the study and recommendation of better methods of perfecting the practice of parole and keeping the paroled persons straight. The Board is empowered to compel the attendance of witnesses and the production of books and papers by subpoena, and may administer oaths. The effort to detach the parole service from politics appears in the provision giving the Board power to appoint the executive director, but with the limitation that the Governor must approve. The chief parole officer and his subordinates are appointed by the Board free of outside control, but subject to the civil service law. The importance of a job to keep a paroled prisoner straight is recognized by the post of employment director in charge of a bureau of employment. The New York lawmakers were persuaded that well paid officials are a good investment. The director gets $9,000 a year; the chief parole officer, $6,000; the supervisors, including the employment director, $4,000; and parole officers a maximum of $3,000.

New Jersey, by Chapter 65, aligns itself with other progressive states, which creates a State bureau of identification within the Department of State Police consisting of a supervisor and such assistants necessary, to be appointed by the superintendent of State Police to collect and file fingerprints, photographs and other information, of all persons who have been convicted of an indictable

1. References are to chapters, unless otherwise indicated.

offense within the State, and of all habitual criminals. The bureau is to cooperate with local police agencies, state bureaus, and the National Bureau in Washington. Clerks of courts before which any prisoner is arraigned on an indictable offense must report to the bureau the sentence or other disposition of the case to enable the bureau to make a report on criminal statistics. Enforcement officers must send to the bureau fingerprints, photographs and other records of persons arrested for an indictable offense.

New York 242 and Virginia 258 regulate the procedure when an inmate of a penal institution is pregnant. Both acts permit the child to be returned to the institution with its mother, Virginia adding that the Commissioner of Public Welfare may instead put the child in the custody of its father or other relative, or may place it with a charitable organization. New York allows the child to remain with its mother in the institution not longer than a year unless the mother is to be paroled before the child is 18 months old, and the child may be removed even before it is a year old. New Jersey 160 allows any person convicted of a crime while under 20, except those committed to the state prison, to ask that the judgment shall not operate to disqualify him for any position or office. The petition must give the particulars of the crime, the present family conditions of the petitioner, his occupation, must state that he has been not convicted of a further crime, and must be signed by 25 residents of the municipality who request that it be granted. The petition must be made ten years or more from the date of the conviction and must be considered by the judge who shall inquire into the matter without being bound by strict rules of evidence and may grant the petition. If the prisoner is subsequently convicted the order shall be revoked. New York 231 makes a limited application of the principle of public defender by allowing the court, in the case of a crime committed by a prisoner in a state prison, to fix a reasonable amount of compensation for an attorney not to exceed $25 a day. In New York after sentence a prisoner may be charged with having been previously convicted and in the trial of this charge the court may also fix an attorney's fee. The fee is paid in the first place by the county which is reimbursed by the state.

Procedure

The Rhode Island Constitution[2] declares that "right of trial by jury shall remain inviolate." The legislature, 1355, thinks this is a privilege of the accused person,[3] and authorizes him to waive trial by jury with the leave of the court, and if he does so, the court "shall have jurisdiction to hear and try the cause—to render judgment and pass sentence thereon." At the request of the accused, the court may make a special finding on any issue of fact and a special ruling on any question of law.

By a general law which will apply to criminal trials, Virginia thinks that she overestimated the disabilities of age, and by Chapter 236, strikes out the exemption reading "But no male citizens over sixty years of age shall be compelled to serve as a juror." New York 298 deals with suspension of sentence and provides that the judge may not suspend sentence or the execution thereof in the case of a felony until a report has been made him of the circumstances of the offense and the criminal and social history of the offender. The old statute required that this report must be made before probation, and the effect of the new act is to prevent suspension of sentence by the court until the report is in its hands. Chapter 8 amends an act requiring a similar report in writing to the court from probation officers, to include the case of a child before the juvenile judge can act. South Carolina, No. 788, makes it mandatory on magistrates to grant a preliminary hearing to any defendant who requests it and directs him not to transmit the case to the court or submit it to the grand jury till the hearing is had. The defendant cannot delay too long, as the demand must be made at least ten days before the court of general sessions next convenes. South Carolina No. 747 increases the importance of the crime of perjury by raising it into the class of crimes where the defendant has ten peremptory challenges of jurors and the state five. Formerly both defendant and state had five. Virginia 238 adds a form for an indictment for murder and another for manslaughter, but does not make the use of the form mandatory since any indictment from which the accused may learn the nature and cause of his accusation is good. New York 500 strengthens its provision for the discipline of inferior courts. Formerly the Appellate Division, an intermediate court of appeal, could remove judges of inferior courts. The new law gives it power to make an investigation of the inferior courts and their judges through one of its members or through a referee which it appoints.

Bail

The question of bail is still engaging the attention of the legislatures. Massachusetts 240 deals with the root of the institution—the bondsman. It raises from three to five the number of separate cases within a year in which a non-professional bondsman may offer bail without obtaining the approval of and registration with the superior court. It shall be considered a separate case where a person "at one and the same time" offers bail in two or more offenses, at different times for two or more cases committed at the same time or arising from the same transaction or "course of conduct," or where two or more persons at the same time offer

2. Art. I, Sec. 15.

3. *Patton* v. *U. S.*, 281 U. S. 276, is authority for the view that a jury trial may be waived under ART. III, §2, and the Sixth Amendment of the Constitution, but the Supreme Court thinks that there is sufficient public interest involved, so that "before any waiver can become effective the consent of the government counsel and the sanction of the court must be had, in addition to the express and intelligent consent of the defendant." The Rhode Island statute does not require the consent of government counsel, and action strictly in accord with its terms would not fulfill the conditions laid down in *Patton* v. *U. S.* As that case held that a waiver would be approved under the general control of the court over trials, without an express statute, the Rhode Island law under this jurisprudence would either be unnecessary or might be held bad if the court thinks that the legislature sought to eliminate the consent of the district attorney, a necessary element in a valid waiver. However, there would be no review of the decision of the state court, [*Maxwell* v. *Dow*, 176 U. S. 581] and the Rhode Island judges are not controlled by the opinion in *Patton* v. *U. S.*, so that they may hold the statute a valid grant of power on the ground that the consent of the district attorney is unnecessary, or they may decide that they had the right to approve waivers under a general grant of judicial power without an express grant by statute. In this view, the statute would be a limitation on the general power and be invalid as attempting to eliminate a necessary element in a constitutional waiver, the consent of the district attorney. The Rhode Island court has already held that a waiver is impossible where the statute requires a jury trial.

State v. *Bailey*, 32 R. I. 475. The statute involved in that case was repealed by C. 1337 to make way for the new system.

bail for an offense committed jointly, or "in a common course of conduct."

Virginia 391 provides relief to bondsmen by giving the Governor power to remit or refund forfeited recognizances, or a judgment thereon, if he thinks that the evidence accompanying the application warrants this relief. Rhode Island 1403 requires the court to sentence on motion of the attorney general when a motion for a new trial is denied after a verdict of guilty, but allows release on bail of the person sentenced, after notice of his intention to prosecute a bill of exceptions. The recognizance is fixed in such sum as the court deems reasonable to secure his appearance. Giving the recognizance is to act as a *supersedeas* till the bill is abandoned or passed upon. New York 616 raises the amount of bail in police court and courts of special sessions outside New York City, from $200 to $500.

New Crimes

Kentucky 191 amends a former law which provided that any person shooting from ambush at another should be confined in a penitentiary from one to ten years, by including the case in which the person was actually wounded by a shot from ambush. The Kentucky Supreme Court had held[4] that a charge of shooting and wounding from ambush was not within the former section, but was punished by another section which made the penalty for shooting at and wounding another, but not killing him, only 1 to 5 years of imprisonment. Descendants of frontiersmen might well have considered it just to punish doubly a malefactor who besides having bad intentions was a bad shot, but to the modern spirit it would scarcely seem reasonable to encourage marksmanship by permitting twice as long a maximum where a person shoots from ambush and misses, as where he shoots from ambush and hits. In the same state, Chapter 18 contains an interesting modification of the statutory rape law which provides that in case of carnal knowledge of a child between 16 and 18 the punishment should be imprisonment in the penitentiary from two to ten years. The amendment will permit in such case where the minor is a female and where the evidence beyond reasonable doubt shows that she is immoral or of such reputation, the defendant to be found guilty of a misdemeanor and fined not more than $500.[5] It is a little striking that the legislature did not treat men and women equally in this exception. The law which it amends punishes either a man or a woman carnally knowing a child under 18 without its consent. The way in which the amendment is drafted, however, will not allow a woman to prove the immorality or bad reputation of a boy between 16 and 18 with whom she had relations, while a man may escape being convicted of a felony if he can prove the bad reputation of a girl. Probably there have been no convictions of women for this crime in Kentucky, but may not this amendment fail to give equal protection of the laws to the female sex? South Carolina No. 736 adds to its list of crimes the smoke screen law, making unlawful the attaching to a motor vehicle of a device for emitting smoke or any noisome gases or odors. A breach of the act is a serious matter, since imprisonment is from 6 months to 2 years or fine between $200 and $500. The motor vehicle is forfeited to the county, but may be redeemed by the owner on agreement with the county officers. The statute expressly protects the rights of innocent owners or mortgagees. Louisiana Act 64 makes it involuntary homicide to kill a person by grossly negligent or reckless operation or use of a vehicle if the act is not wilful or wanton. It gives the court a wide latitude in punishment by fixing only a maximum of five years, with or without hard labor. The act does not repeal the law on manslaughter and the district attorney in a proper case may charge with manslaughter a person who causes death with a motor car, but the crime of involuntary homicide is deemed to be included in every charge of manslaughter, so that the jury may render a verdict of involuntary homicide, if it does not find the accused person guilty of manslaughter. In prosecutions under this act or for manslaughter the question of negligence or recklessness is a fact to be found by the jury and does not depend on exceeding the lawful rate of speed. Many legislators may be interested in New York 571 which smacks of a roundabout enforcement of one element of prohibition. Under this law any person who while engaged in unauthorized manufacture of any liquid containing methyl or ethyl alcohol, causes injuries or endangers the property of another, is guilty of a felony. It is interesting that 571 adds the new crime to a list in an act dealing with the manufacture or keeping of dynamite and other dangerous explosives. Massachusetts by 317 tries prevention before damage is done by declaring that anyone, except law enforcement officers, having in possession or under their control an infernal machine, including any device for endangering life or doing unusual damage to property by explosion, shall be fined not more than $1,000, imprisoned not more than 10 years, or both, and the machine forfeited. New Hampshire 65 makes a suggestion that may be worth noting by the farmers of other states. It tries to reach the nocturnal poultry thief by forbidding the transportation of poultry by night between 9 p. m. and 5 a. m. unless the carrier has a license issued by the commissioner of agriculture. The penalty is not high, as the maximum is a fine of $100, or six months imprisonment or both, but the apprehension of offenders against this prescription may bring to justice those guilty of stealing the poultry. The only statute having to do with the limitation of fire-arms is an amendment by 218, to the New Jersey firearms registration act which makes it a misdemeanor to violate the section requiring the production of a certificate of registration to authorize a sale and keeping of records of sale. Kentucky 178 enforces respect for the flag, punishing by fine of not more than $100 or imprisonment of not more than 30 days or both, placing a figure, mark, advertisement, etc. on the flag or colors of the United States or exposing such flag or selling a flag so marked. Kentucky 76 fines from $50 to $500 any person violating the act forbidding state officers and employees to use state money to buy or oper-

4. *Collins* v. *Commonwealth*, 70 S. W. 187.

5. It had been frequently held by the Kentucky Supreme Court that such evidence was inadmissible and that the chastity of the girl was not at issue. *Alderman* v. *Commonwealth*, 218 Ky. 591. *Yates* v. *Commonwealth*, 211 Ky. 629.

ate motor passenger vehicles or to use state money to ride in motor vehicles on official missions at a greater rate than five cents a mile.

Evidence

By 409 New York amends the law making it a misdemeanor to corrupt an agent or servant of another by adding that if a person asks to be excused from testifying by producing a book or paper before a court, grand jury, or magistrate in any proceeding involving this section on the ground that it may tend to incriminate him, he must nevertheless on the direction of the court produce the books or papers though he cannot thereafter be subjected to penalty because of the transaction in which he had to testify. No one so testifying shall, however, be exempt from prosecution for perjury in his testimony. Kentucky has a statute 171 providing for prima facie evidence of guilt. An act making it a felony to buy or receive certain second-hand copper, zinc or lead with intent to defraud, adds that proof that the defendant bought, received, sold or disposed of the metal and did not follow the regulations prescribed as to buying and selling it, shall be deemed prima facie evidence of his guilt. The legislation punishing the mutilation or identification marks appears in 1930 in New York 823 which extends the rule from vehicle or mechanical devices to any machine or electrical or mechanical device. It is henceforth a crime, not only to remove or alter the serial number on such articles, but even for a dealer to buy or have in stock an article whose identification marks have been tampered with. Evidently as in the case of the New Hampshire poultry carriers, this act is a sort of second line of defense against unlawful taking of property. By making it hard to transport or dispose of stolen property, the legislators hope to render theft unprofitable.

Business Crimes

There is the usual number of statutes prohibiting carrying on business in a particular way and securing compliance by criminal penalty, with other statutes using criminal methods of enforcing such prohibitions. Most interesting to lawyers will be New York 397 which makes it a misdemeanor for a person not an admitted attorney to draw deeds, wills, and other papers or to draw pleadings in any action in a court of record and ask or directly receive compensation for same. The act does not apply to corporations or voluntary associations lawfully engaged in examining or insuring titles or preparing instruments for that purpose or incidental to loans made. Another interesting New York statute, 859, secures further enforcement of the mechanics' lien law under which it was already larceny for an owner to use funds which he had received under advances on a building loan mortgage for another purpose than the paying of the cost of the improvement by making it larceny for a contractor to apply to any other purpose funds received from the owner for improvements of real property, especially the payment of mechanics' liens or persons working on the job. A second section applies a similar rule to sub-contractors. A new business comes in for regulation in New York 326, which provides a fine of up to $50 and imprisonment up to six months for a person who violates the law requiring licensing of persons engaged in the business of procuring blood for transfusion and examination of persons donating blood. An old business regulation comes in for enforcement through criminal law by South Carolina No. 830, which makes it a misdemeanor to charge or collect usurious interest. Kentucky 179 deletes from its act punishing issuing bad checks the provision that if a person guilty of drawing such a check pays it within 20 days of the time he receives notice of its dishonor he will not be punished. New Jersey 121 has another angle on the same point by making it evidence of intent to defraud if the check is made or drawn on insufficient funds, amending a former law in which the drawing of a check was evidence of intent to defraud if the drawer did not pay the drawee the amount due, and costs, within five days after the check was due.

Changes in Penalty

There are few interesting cases of changes in penalty. Massachusetts 382 reduces the maximum term for arson from life to 20 years. Virginia 80, on the other hand, increases from a misdemeanor to a larceny the crime of drawing or delivering a bad check with fraudulent intent and fixes the penalty in the discretion of the jury, or court without a jury, at from one to five years in the penitentiary or in jail not exceeding twelve months and a fine not exceeding $500. South Carolina No. 691 amends its act punishing forgery by one to seven years imprisonment and a fine at the discretion of the judge by adding that if the amount obtained or sought to be obtained on the forged instrument is less than $20, the punishment shall be within the discretion of the judge. These acts give the courts a broad power of fitting the punishment to the circumstances of the crime and of the criminal, while in a special case, Massachusetts cuts down the discretion of a judge to exercise clemency. The Bay State by 185 modifies an old law which provided only a maximum fine of $500 by adding a minimum of $100 as punishment for entering a poultry yard with intent to steal. Evidently the farmers in Massachusetts felt that there was too much kind-heartedness among the judges, and too many light sentences, or perhaps only reprimands. New York 26 applies a well known preventive remedy in addition to criminal punishment to automobile recidivists by adding a provision that the commissioner shall not issue a new license nor restore an old one, in any event, to such persons.

THE MERCHANT ETHIC

Attempts by Social Philosophers, Churchmen and Jurists to Deal With Moral Problems of Trade—Economic Idealism of Middle Ages Withers Before Impact of New Forces—In the Law Men Have Wrought Their Most Detailed Concepts of Human Justice—Modern Business and Social Responsibility*

By Robert C. Teare

THE history of the race is, in large part, the story of an effort to escape scarcity and want. The primitive cave man, seeking a precarious existence with his simple weapons, illustrates this no more clearly than does the latest addition to a long queue of men before the door of a municipal soup kitchen. This principle of scarcity has been declared the mainspring of society, but it may also be said that the activities arising from it are too frequently merely predatory. Indeed, the problem of evil itself has been described as largely economic in its origin. The ancient story of the fabled fall of man, necessitating that he thereafter eat his bread in the sweat of his brow, no doubt illustrates the peril of disobedience, but it may also be taken as a symbol of the inevitable consequence of the growth of population in a world of limited goods.

The thought life of the race has concerned itself most seriously with the eradication, or at least the amelioration, of these predatory activities. Thus, we have the old convention against the poisoning of wells in wartime, the new effort to abolish poison gas, and the attempt to outlaw warfare altogether. We are here concerned with the same problem in another field, namely, that which has been thought and that which may be said concerning the attempt to define the morality of trade, and so to establish, if possible, a basis for a true merchant ethic.

The Challenge of John Ruskin

Of the men of letters who have addressed themselves to the problem, none stands out more boldly than John Ruskin, the art critic who became a social philosopher. His predecessors, Dickens, Thackeray, and Carlyle, had given much attention to the awakened social consciousness of their day; but none had grappled with the matter of business ethics with any particularity. Carlyle, with all his fresh and vehement attack upon the conditions of modern industry, and with all the keenness of his feeling that multitudes had been thereby spiritually disinherited, became exceedingly vague when he attempted a practical program. Ruskin, however, stoutly maintained that our business life must be charged with a moral ideal in its particulars, and the very definiteness of his suggestions regarding production, consumption, wage contracts and the like, created consternation among the good people of 1860. After three chapters of "Unto This Last" had appeared in the "Cornhill Magazine," the outcry against him became so great that the series was hastily concluded, and for a time he was silenced.

Today Ruskin is honored far and near for his insistence that the true merchant not only can, but must, be worthy of a place beside the true teacher, the true lawyer, and the true physician. There are few more searching passages in social criticism than his noble chapter, "The Roots of Honor," in which he treats of merchants, employers and their duties. The pleasure of quoting from it cannot be resisted.

"This fact is," says Ruskin, "that people never have had clearly explained to them the true functions of a merchant with respect to other people. I should like the reader to be very clear about this.

"Five great intellectual professions, relating to daily necessities of life, have hitherto existed—three exist necessarily in every civilized nation:

"The Soldier's profession is to defend it.

"The Pastor's, to teach it.

"The Physician's, to keep it in health.

"The Lawyer's, to enforce justice in it.

"The Merchant's, to provide for it.

"And the duty of all these men is, on due occasion, to die for it. 'On due occasion,' namely:

"The Soldier, rather than leave his post in battle.

"The Physician, rather than leave his post in plague.

"The Pastor, rather than teach Falsehood.

"The Lawyer, rather than countenance injustice.

"The Merchant—What is his 'due occasion' of death?

"It is the main question of the merchant, as for all of us. For, truly, the man who does not know when to die, does not know how to live.

". . . as the captain of a ship is bound to be the last man to leave his ship in case of wreck, and to share his last crust with the sailors in case of famine, so the manufacturer, in any commercial crisis or distress, is bound to take the suffering of it with his men, and even to take more of it for himself than he allows his men to feel; as a father would in a famine, shipwreck, or battle, sacrifice himself for his son.

". . . the public . . . will find that commerce is an occupation which gentlemen will every day see more need to engage in, rather than in the business of talking to men, or slaying them: that in true commerce, as in true preaching, or true fighting, it is necessary to admit the idea of occa-

*A paper read before the Chicago Literary Club on February 9, 1931.

sional voluntary loss; that sixpences have to be lost, as well as lives, under a sense of duty; that the market may have its martyrdoms as well as the pulpit; and trade its heroism, as well as war."

A Word from Bernard Shaw

In our own day, Bernard Shaw has thrust himself forward as one of the most severe critics of our economic practices. In the first of his so-called "Unpleasant Plays," entitled "Widowers' Houses," he presents his general criticism of our economic order. With dramatic art he depicts the exploitation of the poor of our great cities, and, as he writes in his preface, "the pecuniary ties between it and the pleasant people of 'independent incomes' who imagine that such sordid matters do not touch their own lives." As readers of the play will recall, young Dr. Harry Trench is placed in the position of declining the dowry of his fiancée because of the harshly collected slum rents from which it has been accumulated. His youthful idealism sordidly weakens, however, upon the disconcerting discovery that his own seven hundred pounds a year is derived from a seven per cent mortgage upon the same slum properties. As the play closes, he has yielded further, to become a party to a scheme to obtain excessive compensation from the municipality in a prospective condemnation proceeding. As an illustration of the stark harshness of the situations, we may note the words of Mr. Sartorius, the slum landlord, in his speech defending his policies to the young Dr. Trench:

"As to my business, it is simply to provide homes suited to the small means of very poor people, who require roofs to shelter them just like other people. Do you suppose I can keep up these roofs for nothing? . . . My young friend, these poor people do not know how to live in proper dwellings: they would wreck them in a week. You doubt me: try it for yourself. You are welcome to replace all the missing handrails, banisters, cistern lids and dust hole tops at your own expense; and you will find them missing again in less than three days—burnt, sir, every stick of them. I do not blame the poor creatures: they need fires, and often have no other way of getting them. But I really cannot spend pound after pound in repairs for them to pull down, when I can barely get them to pay me four and sixpence a week for a room, which is the recognized fair London rent. No, gentlemen: when people are very poor, you cannot help them, no matter how much you may sympathize with them. It does them more harm than good in the long run. I prefer to save my money in order to provide additional houses for the homeless, and to lay by a little for Blanche. . . . When I, to use your own words, screw, and bully, and drive these people to pay what they have freely undertaken to pay me, I cannot touch one penny of the money they give me until I have first paid you your £700 out of it. . . . It is because of the risks I run through the poverty of my tenants that you exact interest from me at the monstrous and exorbitant rate of seven per cent, forcing me to exact the uttermost farthing in my turn from the tenants. And yet, Dr. Trench, you have not hesitated to speak contemptuously of me because I have applied my industry and forethought to the management of our property, and am maintaining it by the same honorable means."

Although Ruskin of the nineteenth century and Shaw of the present both fail to give us much of practical guidance, their keen criticism provides a challenge of the first importance. They force us to consider whether business can have any idealism, or, perhaps, any heroism, or whether we must confess that it is, after all, a very sorry thing at best.

II

We cannot tarry, however, with these stimulating challenges but must proceed to the actual casuistry of business, as it has been developed by the social philosophers, the churchmen and the jurists.

The student of history promptly tells us that the subject has been one of sharp differences from the first. On the one hand, Aristotle, like we moderns, had considered that fundamental question of whether it is right to buy as cheaply as possible and to sell as dearly as possible. He had arrived at the very definite conclusion that such practice, however common, was not just. He and his followers went even beyond this position to denounce all trade as necessarily base, and trading profits, therefore, as little better than outright robbery.

In opposition to the views of Aristotle, however, many of the Roman jurists frankly admitted trade to be a necessity and, moreover, assumed that it need not be linked with moral considerations. Profits were conceded to be inevitable.

The Church and Business Ethics

This question of what to do with these troublesome problems of trade soon became a prominent one in the Christian church, and the theories evolved are of some interest to us. After much clashing of opinion, the doctrines of the "just price," the evil of usury and the sinfulness of avarice emerged. The detailed guides for the use of the confessors and the devout of that day devote a surprising amount of attention to the details of business ethics. The church fathers are instructed to make inquiry into the use of unjust weights and measures, the withholding of wages, the sale of fraudulent wares, the removing of landmarks, the common evasions of usury, such as fictitious partnerships and loans in guise of sales, as well as other infringements of the rule against avarice. From Thomas Aquinas down to Martin Luther, these theories were urged with all vigor, based on the underlying thought that society is not an economic machine but a spiritual organism, and that the economic appetites should not become the masters of the society of men.

This economic idealism was possibly never taken with too much seriousness by the Church itself in its own affairs. At any rate, it was soon to wither before new forces. The discoveries of the fifteenth century and the growing commerce of the world, expanding into the western hemisphere, brought into existence a new mercantile class of wealth and power, in whose ears the mediaeval doctrines against usury and profit seeking sounded

exceedingly strange. Champions of their viewpoint were soon to appear.

The Teaching of Calvin

In the pages of Mr. Tawney's "Religion and the Rise of Capitalism," we have an extended study of how Christianity, in the form of Calvinism, turned from the earlier economic viewpoint of the small market town to that of the large trade center and its men of affairs. Calvin and his followers, in other words, began to take the main features of the new commercial civilization for granted, and therefore prepared their teaching for application to such conditions, all quite unconsciously no doubt. Tawney concludes that Calvinism was "perhaps the first systematic body of religious teaching which can be said to recognize and applaud the economic virtues." But he adds that the system was likewise "the attempt to make the law of God prevail even in those matters of pecuniary gain and loss which mankind . . . is disposed to regard more seriously than wounds and death."

We cannot pause here to follow the interesting details of Tawney's argument, but two considerations may be noted.

In the first place, Calvin's recognition of the new day of business did not blind him to the need of a strict ethic. He recognized interest, but on the strict condition that it should not rise above a certain rate, and on the further condition that loans should be made without interest to the poor. The borrower must benefit equally with the lender, and no man might grasp economic gain for himself to the injury of his neighbor. Life was to be a place where the very qualities demanded by economic success, such as frugality and sobriety, were to be the most effective elements in the service of God.

In the second place, however, Calvin's teaching was an entering wedge for the philosophy of the intense individualism arising with the breakdown of feudalism and the growing power of the middle classes. The social idealism with which Calvin had expected to temper selfishness gradually gave way to the form of occasional almsgiving and sentimental compassion for inferiors. And with this philosophical change, business became more and more impersonal and more a pure matter of economic expediency. Few thought of questioning the slave trade, the use of children as chimney sweeps, or the employment of women and children in the mines. All this was done in the name of business, which eagerly sought justification in Adam Smith's famous doctrine of the "invisible hand," which was to bring these clashing, selfish forces into providential harmony for the good of all.

In such an individualistic society, clinging to all ideas accommodated to its interests and reiterating such phrases as "God helps those who help themselves" and "Business is business," it is little wonder that the humanitarianism of the Ruskins and the Shaftesburys struck fire of intense opposition.

We have now passed in very brief review some of these contributions to the merchant ethic from the men of letters and the men of the church. The impassioned words of Carlyle and Ruskin, the searching situations of Bernard Shaw, the demand for fair dealing from the mediaeval church theorists, and the practical idealism of Calvin need to be repeated again and again.

III

During all these centuries, however, still another factor has been at work. So quietly has it functioned that its vast and intricate casuistry has too often been overlooked, if not scorned, by the idealists. It is in the law, however, that men have wrought their most detailed concepts of human justice, and, regardless of its admitted limitations, to which we shall refer at a later time, we can by no means ignore such a rich deposit of the practical wisdom of the race. The law of sales, of contracts, of bailments, of common carriers, of torts, of bankruptcy, and the like, treat in most intimate fashion a vast array of practical problems involved in the ethics of the merchant. The field is so vast, in fact, as to involve great libraries, of many languages, and to engage the lifetime study of many thousands of men.

In his fascinating lectures on "Law and Morals," Dean Pound has made the observation that law and ethics were clearly regarded as almost synonomous at the close of the eighteenth century, i.e., in the sense that the law was regarded as merely the statement of universal principles. He adds that, although certain periods have denied any such close relationship between law and morals, these same periods have in reality been profoundly influenced by the ethically creative periods which preceded them. In these creative periods, such as that which was marked by the rise of the principles of equity, the student of business ethics finds rich material.

The Law and Just Dealing

Such a consideration of the law, as the embodiment of the principles of just dealing, leads us to observe the rule for equal treatment of creditors in bankruptcy, but with preferred positions upon occasion for those in a particularly weak position; the general principle that the necessitous man is entitled to the special protection of the courts; the restrictions upon the dealings between the trustee and those who trust; the implied warranties accompanying the sale of goods, that the articles sold will serve their purposes; the principle that a man will be held to account for his formal agreements; the principle that certain rights cannot be waived by contract, as in the case of the redemption period under a mortgage foreclosure; the principles that he who seeks equity must do equity, and that he who comes into equity must come with clean hands; the principle of voluntary contract, enabling a person born in poverty to create for himself a position of wealth and power; and many other principles which, with all their ramifications and exceptions, fill the law books. Difficult as it may be to secure the free benefit of these principles, because of the much criticized rules of procedure, they bear the approval of time. A broad understanding of them would clear up many a muddled business situation.

We shall not attempt the lawyer's task of any analysis or qualification of these principles of the law. We may pause, however, to give some attention to a relatively new and exceedingly interesting body of administrative law which bears particularly upon the right and wrong of business conduct. Our

reference is to the rules which have been evolved by the Federal Trade Commission since its establishment by the legislation of 1914.

The Federal Trade Commission

The Federal Trade Commission,[1] it will be recalled, was empowered to enforce the general rule against unfair methods of competition in interstate commerce. Its proponents had enthusiastically presented it as a means of setting up a new standard for the business community. The practical results of this new search for a better merchant ethic are, therefore, of particular interest to us here.

The first set of problems faced by the Federal Trade Commission goes back to that ancient question of whether it is right to buy as cheaply as possible and to sell as dearly as possible. The modern answer to this ancient question makes no reference to avarice or the notion of a "fair price," but, on the contrary, gives free rein to the concept that owners of goods may, under usual circumstances, offer their wares at such prices as they may choose. The exceptions, however, are of interest and will bear examination.

In the first place, we find, strangely enough, that the Commission has, under circumstances, frowned upon the idea of selling goods too cheaply. The usual purpose of such a rule is to prevent local price cutting for the purpose of harming or eliminating some small competitor. The Commission has also endeavored to oppose the selling of goods below cost, but this proposition has met with no general support in the courts.

In the second place, the Commission has faced the complex problem concerning the propriety of allowing or refusing wholesale discounts to chain stores or associations of retailers. It is the question of whether the manufacturer, for example, shall endeavor to protect his jobber and the small retailer, or whether he shall simply follow a fixed scale of discounts based on the quantity purchased. In general, the Trade Commission has apparently held it to be unfair to refuse wholesale prices to those prepared to buy and pay for wholesale quantities. The courts on the contrary, however, seem to have upheld the right of freedom of contract, even in the face of some discrimination between different classes of buyers.

A third point of price policies deals with the question of whether manufacturers can control the retail selling price of their products. And it is probably safe to assert that no question of price policy has aroused more debate than this. We are all aware, of course, that the scheme of price control has not prevailed, and the ubiquitous cut-rate drug and grocery stores are constant reminders of the fact. The Supreme Court, in assuming responsibility for this "cut-rate" state of affairs, has held that any plan of identical resale contracts would be as much a restraint of trade as any combination among the retailers themselves. At the same time, however, the Supreme Court has permitted manufacturers to recommend a uniform list of resale prices, and, moreover, to announce that they will maintain the right of simply refusing to deal further wherever the list is not respected. The subject continues, however, to be one of keen debate, both within and without our legislative bodies.

These points of price policies have, of course, been but one phase of the work of the Federal Trade Commission. The scrutiny of merchandising tactics has been equally important.

The Commission and Merchandising Tactics

As far as these merchandising tactics are concerned, it is well to observe that the Commission has not attempted the impossible task of acting as a benevolent guardian of a completely helpless public. It has not sought to eliminate what the lawyers call "seller's talk" or sundry other practices which, while improper from a strictly ethical point of view, do not fall within the category of being misrepresentations of material facts. It has, however, restrained the sale of cotton goods as woolen, or under names implying that they were woolen. It has ruled that celluloid cannot be sold as ivory, and generally that substitutes must be sold as something different from the original article. In like manner, a manufacture of chemicals was ordered to cease selling a weak preparation as a powerful germicide, and a rebuilder of automobile tires was ordered to cease selling them without clear indication of their second-hand character. Similar pronouncements have been made against false claims to endorsement or use, and against the imitating of established brands and trade-marks. As we all know, the bought-and-paid-for endorsements of cigarette brands, by opera stars and others, have been relegated to the limbo of forgotten things, along with fake recommendations of drug and food products by rigged-up bureaus and other organizations of apparently a disinterested and scientific character.

Commercial Bribery

Still another form of sales tactics, which is meeting increasing opposition but which has long flourished like a greenbay tree, is that of commercial bribery. The last international gathering of Rotary International gave great attention to this subject and it is understood that the next meeting will give it major consideration, as one of the most serious moral problems of business today.

The Federal Trade Commission, as we might expect, has exerted its powers to eliminate, as far as possible, the practice of bribery. In one of these cases, it found a glue manufacturer guilty of having paid a five per cent commission, amounting to some thirty-four thousand dollars in less than two years, to a factory superintendent on all material purchased by the factory under his control. The Commission has also fought the practice, said to have been prevalent in the radio industry recently, of subsidizing the salesmen of distributors as a method of increasing the sale of their particular products.

It is probably safe to say that the Federal Trade Commission has been somewhat appalled by the difficulty of this problem of bribery, for it confronts a practical condition and not a theory. The matter is no less serious for the sales manager who may pay dearly in loss of sales for his adherence to his principles. If he is somewhat less conscientious, he may adopt the policy of condemning bribery officially but of passing sales expense accounts generous enough to cover not only money bribes but

1. The author acknowledges his particular indebtedness in this discussion to "Public Regulation of Competitive Practices," published by the National Industrial Conference Board.

lavish presents and generous hospitality of the kind which is supposed to have been legislated out of existence. For the executives in many lines of business, at any rate, the problem remains as one of grim and practical import.

The use of money and gifts for the purpose of inducing employees, agents, and public officials to commit breaches of trust is a practice which has come down to us from antiquity, and there are plenty of realists to assert that bribery will long hold its place in our social order. Many years ago Professor E. A. Ross wrote a small book entitled, "Sin and Society." That notable little volume was devoted in a large measure to respectable sinners, of what Professor Ross designated as the "criminaloid" class, who are only too willing to bribe others to do such things as approving faulty fire escapes, unsafe boilers, and dangerous excursion steamers, for continued use and profit. Such behavior is by no means a thing of the past, but it is very encouraging to observe that the years of popular denunciation have not been without some wholesome effects. The trade associations, particularly those controlling the purchase of commodities frequently linked with bribery, are undoubtedly in a position to accomplish much for the elimination of such sales policies.

Relations Between Competitors

We have observed briefly the work of the Federal Trade Commission in the two large and important capacities, i.e., the control of price policies and control of sales tactics. Before bidding farewell to our hasty review of some of the practical points of business policy which have appeared before the Commission, it is pertinent for us also to note that the difficult subject of relations among competitors has likewise been considered. By this is implied such matters as passing out information derogatory to a competitor, or interference with his contract relations with his trade. It also concerns the stealing of trade secrets through a competitor's employees, as well as the enticing of employees away from a competitor for similar reasons. It likewise concerns threats of infringement suits in situations where patent rights are not clear, as a means of intimidating dealer relationships. The same category also includes the whole subject of conspiracies in restraint of trade.

Trade Practice Codes

In its approach to these matters, the Commission has made use of two important sources of theoretical and practical aid. In the first place, it has frankly asked the members of the various trades to submit codes of trade practice which, in the opinion of the trades themselves, embody the conditions necessary for fair competition. These codes, sometimes referred to as "codes of ethics," were requested without any legislative sanction, but in the belief that business might thereby readjust itself to changing conditions, and, moreover, that these self-imposed rules might be exceedingly valuable to the work of the Commission. At a matter of fact, a great deal of interesting material was gathered in this way. The plan appeared to be working quite successfully, when the Department of Justice appeared on the scene with an investigation of the trade practice codes. The ensuing report was to the effect that several of the industries were actually engaged in activities contrary to the Clayton Act, but under the sanction of codes which had received the approval of the Federal Trade Commission. In other words, it was held that the trades, in their efforts to control harmful competitive methods, had passed beyond into unlawful restraints of trade. Under the fire of such criticism, as well as some decisions of the Supreme Court, the Commission, in April, 1930, announced a new trade practice policy. Thenceforth, it declared in effect, it would no longer oppose merely unethical or disadvantageous practices through these codes, unless they should also be actually illegal. It is indeed singular that these codes, presumably established to promote the morals of business, should themselves suffer under the charge of being conspiracies against the general interests of the public at large.

The Federal Trade Commission, however, has had another source of aid and assistance. By this, we mean the established principles of the common law, as they are found to deal with that vague and uncertain realm of what constitutes "fair play" among competitors. At the same time, there have been instances where new conditions have involved apparently new principles. And of these we may take the subject of exclusive dealer relationships as an example.

Exclusive Dealer Relationships

Now by an exclusive dealer relationship is meant the practice of requiring a merchant to deal solely and exclusively in no other goods of a given type than those of a single manufacturer. Such an agreement, we may observe, injures no particular competitor but is rather aimed to cut off all competition in that particular quarter, i.e., as far as that particular merchant is concerned. We are all familiar, of course, with dealers specializing in the sale of certain mechanical contrivances, from typewriters to automobiles, and the proposition of such exclusive sale seems, on the face of things at least, to be quite natural and altogether reasonable. In many cases, in fact, it is obviously to the advantage of a merchant to concentrate his efforts upon the sale of a particular line of products. Nevertheless, there are many small articles which cannot justify individual sales agencies, but which must be sold in department stores, and other shops where an assortment of merchandise is presented. If a given manufacturer, for example, may exclude his competitors, one after another, from each of these department stores and shops, one after another, by exclusive dealer agreements, a state of monopoly and restraint of trade is virtually realized. All of this was pointed out by the Federal Trade Commission in the case of a certain manufacturer of paper dress patterns, who had threatened to monopolize the available established channels of distribution.

In these various ways, which we have recited in some detail, the Federal Trade Commission has sought to regulate competitive practices, and to establish some principles for the guidance of the business of the future. As much could be said for the Interstate Commerce Commission, and for those who have administered the pure food and drug laws. In fact, even a brief review of legal principles and

administrative rules, when combined with the knowledge that these have been extended with almost infinite revision and refinement, might lead us quite willingly to believe that the law contains an adequate answer for the ethics of every business situation. This is so nearly true, indeed, that no consideration of business morals may omit due deference to these most significant contributions from the keen, trained minds of the legal profession.

IV

The jurists themselves, however, would be the first to acknowledge that the law and the true merchant ethic of ideal business conduct do not in actuality coincide. Morals have ever seemed shrouded in a mist of subjective attitudes, and men have ever been slow to legalize more than what the common consciousness has demanded. Even in our modern day, which has been marked by some social legislation and judicial interpretation of an advanced type, we still live under the influence of a strict law inherited from the nineteenth century. As Dean Pound has pointed out, this strict law of ours is probably a reaction from that eighteenth century emphasis upon the liberty, freedom and rights of the individual, out of which came the excesses of the French Revolution. And strict law, whatever may be its merits from the point of view of affording security, abounds in the affording of opportunities for the unscrupulous.

In illustration of these opportunities for the tricksters, we may remind ourselves of the fact that the very Statute of Frauds has been a means of aiding the fraudulent. Solemn promises, unless supported by technical considerations, and verbal representations, unless embodied in the written contract, flourish all too freely, to the sorrow of those who trust too much. The very doctrine that every man is charged with a knowledge of the law, though admittedly necessary for any legal structure whatsoever, is a hard teaching, and has no doubt been the basis of many actual injustices. Moreover, the complexities of our rules of procedure, and the ease with which the party with the long pocketbook often may effectually defeat the party who has nothing but a just cause, have had the effect of seriously undermining the average business man's respect for the law as an instrument of practical justice. In all fairness, of course, it must be said that this impatience is more against the delays of procedure than against the theory of the law itself. But when all is said, few will deny that the law, in laying down definite, utilitarian principles, necessarily creates a profusion of distinctions affording possibilities of shrewd rascality.

V

It would appear, therefore, that our search for the true merchant ethic must carry us beyond the law, into the realm of personal attitudes, particularly as they bear upon that twilight zone of conduct which Mr. Owen D. Young has called the penumbra between the clear light of wrong doing and the clear light of right doing.

At this point we enter upon the new concept of business as the youngest of the professions. As a newcomer, at least, even if not as a plebeian or barbarian, in the aristocratic society of the professions, business has looked about a little, and has casually observed the conduct of the older members of the group. From such a study, certain very helpful principles have become evident.

The Canon of Efficiency

In the first place, the merchant with wares to sell, and we must remember that we are all merchants of our labor or services at least, discovers that he is charged with a new professional responsibility of knowing his business thoroughly, in order that he may present his goods intelligently and with due regard for the interests of his customers. Finding the engineer, the physician and the lawyer all strictly charged, by their own codes of professional ethics, and indeed by their entrance examinations, with the necessity of knowing their work with a certain advanced minimum of efficiency at the very least, the merchant perceives the importance of finding some similar standards for himself. He therefore holds himself responsible for producing and selling desirable merchandise at the lowest practical prices compatible with fair working conditions for his employees. The law, of course, cannot impose such a condition upon him, but many a merchant prince has adopted the standard for himself.

Such considerations as these need little emphasis in a world which has seen so many cardboard enterprises totter in the periodic interludes of business depression. We need manufacturers who will avoid the waste of time and money involved in the production of unnecessary goods, as well as defective goods. We need commercial bankers who will confine their extensions of credit to solvent borrowers, and so protect the funds of their depositors. We need merchants of stocks and bonds who will not only refrain from selling "blue sky" securities of the traditional wild-cat type, but will also exercise with diligence every reasonable precaution to keep their lists clear of items of dubious merit. This is no wish for utopian perfection, for perfect business judgment is no more to be expected than infallible diagnosis from the physician. What we have every right to expect, however, is the application of reasonably diligent care and attention to these matters, never forgetting that it is precisely this diligence and wisdom on the part of our qualified business men, as distinguished from the irresponsible criticism of certain types of reformers, which has provided all that we have in systems of communication, in industries and in our relative degree of security from the hostility of nature. If it be said that our economic order still leaves much to be desired, and that the idea of a relative security is a bitter mockery for many thousands of our unemployed fellows, we may nevertheless rejoice in the growth of this professional interest among our business men in the diligent seeking of a more careful and intelligent production and distribution of the goods which society requires. Such a spirit must indeed occupy an essential place in the merchant ethic, for without it little advancement can be made under any conceivable economic system.

There are those who will hasten to say that this presents the appearance of being a broad ap-

(*Continued on page* 268)

MR. JUSTICE EDWARD TERRY SANFORD

Parentage, Education and Early Professional Connections—"Had Many Qualities of a Great Lawyer in Every Line of Practice"—Preference for Chancery and Appellate Court Work—Appointment and Enviable Record as District Judge—Services Upon the United States Supreme Court, etc.

By James A. Fowler
*Member of the Knoxville, Tenn., Bar**

EDWARD TERRY SANFORD was born in Knoxville, Tennessee, July 23, 1865. He was a son of Edward J. and Emma (Chavannes) Sanford. His father came to Tennessee from Connecticut, and located in Knoxville prior to the Civil War. His mother was of French-Swiss descent, her parents migrating from Switzerland, and locating in Knoxville in or about 1848. Edward Terry was the oldest of a family consisting of three sons and three daughters. After locating in Knoxville Mr. Sanford's father became wealthy, as wealth then and there was reckoned. He took great interest in his children and was especially anxious for them to be well educated. After graduating from the City schools of Knoxville, Edward entered the University of Tennessee, and there graduated at the head of his class in 1883. He then entered the Literary Department of Harvard University, graduating from that institution in 1885. He spent one year traveling and studying in Europe, and in 1886 entered the Harvard Law School, and graduated therefrom in 1889. While there he made a splendid record, and became one of the Editors of the Harvard Law Review, which was established the first year he was a law student. In the meantime he had taken the bar examination, and had been admitted to practice in the Courts of Tennessee.

Upon his return to Knoxville in 1889, he entered the law firm of Andrews & Thornburgh. George Andrews had come to Tennessee from the State of Michigan, was for a time on the Supreme bench of Tennessee and was one of the State's ablest lawyers. J. M. Thornburgh had been a Colonel in the Federal Army during the Civil War, and was subsequently a member of Congress for two terms. He was especially able as a trial lawyer. The firm had an extensive practice in Knox and surrounding counties. Judge Andrews lost his life in a railroad accident but a few months after young Sanford entered the firm; and it was necessary for Mr. Sanford to take over the extensive business which had been looked after by Judge Andrews. This occurred about the time the Supreme Court convened at Knoxville for its annual session, and Judge Andrews had a number of cases pending in that Court. However highly a young man may be educated in the schools, yet he is more or less groping in uncertainty when he enters upon the active practice. And because of young Sanford's unwillingness to do anything imperfectly, the extensive and important business thus thrust upon him was very burdensome. However, he applied himself to the task with great diligence, and within a remarkably short time he acquired the habits of a well trained practitioner. A few months after the death of Judge Andrews, Major C. E. Lucky, an Ex-Confederate soldier, became a member of the firm. This partnership existed but a short time, as Colonel Thornburgh died in 1890. The firm of Lucky & Sanford continued until L. D. Tyson was taken in as a partner. Mr. Tyson was a graduate of West Point, and studied law while in the Military Service. He withdrew from the firm and assumed command of a regiment shortly after war with Spain was declared in 1898. Upon the withdrawal of Colonel Tyson, J. A. Fowler became a member; and the firm thus remained until Mr. Sanford accepted the position of Assistant Attorney General of the United States in 1907.

Every lawyer of ability is more proficient in some lines of practice than in others. Mr. Sanford had many qualities of a great lawyer in every line of practice. If he had applied himself to *nisi prius* work he would undoubtedly have been a very successful trial lawyer. He was pleasing in address, quick in his mental processes, ready at repartee, forceful in discussing questions of both fact and law, and he impressed both Courts and Juries with his fairness and sincerity. But he possesed an unusually cautious disposition, which made it very unpleasant to him to be compelled to act upon the spur of the moment in emergencies that from time to time arise in the course of a trial, and he therefore disliked trial work before Juries. The practice which he preferred, and in which he excelled, was the preparation and presentation of arguments in chancery causes and before Appellate Courts. But few lawyers possessed equal ability with him in that line of work; and unquestionably cases were won by the skill and force with which he presented them to the Courts. He was unusually industrious, and was also inclined to devote more than the usual amount of time to a document or a brief. He was never satisfied until he believed that the instrument or the brief was in a condition as near perfect as he could make it. While having confidence in his own ability, yet he was always anxious to have his judgment confirmed by the judgments of others; and he therefore rarely regarded a paper as complete until he had submitted it for criticism to those with whom he was associated.

In 1905 the United States Government began an investigation of what was known as the Fertilizer

*Hon. James A. Fowler, Knoxville, Tenn., was Assistant Attorney General during the administration of Presidents Taft and Harding and a part of the administration of President Coolidge.

Trust. Much of the activities of this alleged combination were in the Southern States, partly in Tennessee. Mr. McReynolds, now Mr. Justice McReynolds, of the United States Supreme Court, was then an Assistant Attorney General of the United States. Being personally acquainted with Mr. Sanford, at his instance Mr. Sanford was employed as a Special Assistant to the Attorney General to prosecute the fertilizer manufacturers. In this work he was associated with some of the agents and attorneys of the Department of Justice. Mr. McReynolds resigned from the Department about the first of January, 1907, of which fact an agent of the Department notified Mr. Sanford, and expressed the belief that he could secure the appointment to the vacancy if he so desired. Mr. Sanford for a time hesitated to apply for the position. However, he had frequently mentioned to those with whom he talked in confidence that he would like an appointment to the Federal bench. It was then known that Judge Clark, the United States District Judge for the Eastern and Middle Districts of Tennessee, was in failing health, and it was not expected that he would remain upon the bench very much longer. It was therefore suggested to Mr. Sanford that his relationship with the administration as Assistant Attorney General would give him quite an advantage in a contest for appointment to the District bench, when the vacancy would occur. For that reason he applied for the position, and was at once appointed.

While in the Department of Justice he made quite a record for industry and efficiency. A number of cases pending in the Supreme Court were assigned to him by the Solicitor General (Mr. Hoyt) for preparation and argument; and he made a very favorable impression upon the Court. He also had an opportunity of becoming acquainted with President Roosevelt; and the President acquired quite a liking for him. Judge Clark died on the 15th day of March, 1908. But Mr. Sanford had by that time decided that he would rather remain in Washington than be appointed District Judge. At first he declined to permit his name to be used as an applicant, though the President was ready to appoint him at any time he might express a willingness to accept the position. The names of a number of lawyers in the two districts presided over by the District Judge were urged upon the President. And as generally occurs under like circumstances criticisms of them all were presented as well as endorsements. The President finally stated to an influential Republican from Tennessee, that he thought the best solution of the situation was to appoint Sanford. When communicated with he agreed to accept it; and his appointment was immediately sent to the Senate.

To those with whom he was intimate he related a conversation he had with then Associate Justice White after being appointed District Judge and before leaving for Tennessee. The Justice told him that his position in some respects was the most important in the Federal Judiciary System, that there the first and real hearing of a case was had, and upon that hearing depended very largely whether justice would be administered in the cause. But that which impressed him most was a prophecy made by the Justice that he, Sanford, would some day occupy the position then held by the Justice.

Probably no District Judge ever made a more enviable record than was made by Judge Sanford. He had jurisdiction over two Districts; and there was enough work in either of them to keep a Judge busy. It was therefore impossible, especially for one of Judge Sanford's disposition, to keep the docket clear. Under no circumstances would he permit a case to pass through his Court without the most careful consideration. He was just as careful in trying and disposing of an accusation against the most humble mountaineer as in considering the most important litigation pending in his Court. Never did a Judge have a keener sense of Justice, or was inspired with a greater determination to see that equal and exact justice was administered to every one. If he deviated in any respect from that course, it was on the side of mercy towards the many poor defendants who were arraigned before him. Anyone entering a Court room where he was presiding at once realized that he was in the presence of one who represented the dignity and power of the United States Government.

In the trial of a cause he would permit no wrangling between counsel, and required the trial to proceed in a dignified and orderly way. He was always alert to the proceedings before him, and kept along with the course of the testimony. From time to time he would propound questions to both counsel and witnesses, so as to direct the proceedings to the real points in controversy and eliminate unimportant issues. If he saw that counsel either purposely or by oversight failed to elicit from a witness material facts he apparently knew, he did not hesitate to question the witness himself upon the subject evaded. He always ruled promptly upon objections to testimony. But if during the progress of a trial he concluded that he had ruled improperly, on his own motion he would reverse his ruling. He would not permit himself to be influenced by pride of opinion, and gave the most careful consideration to arguments of counsel.

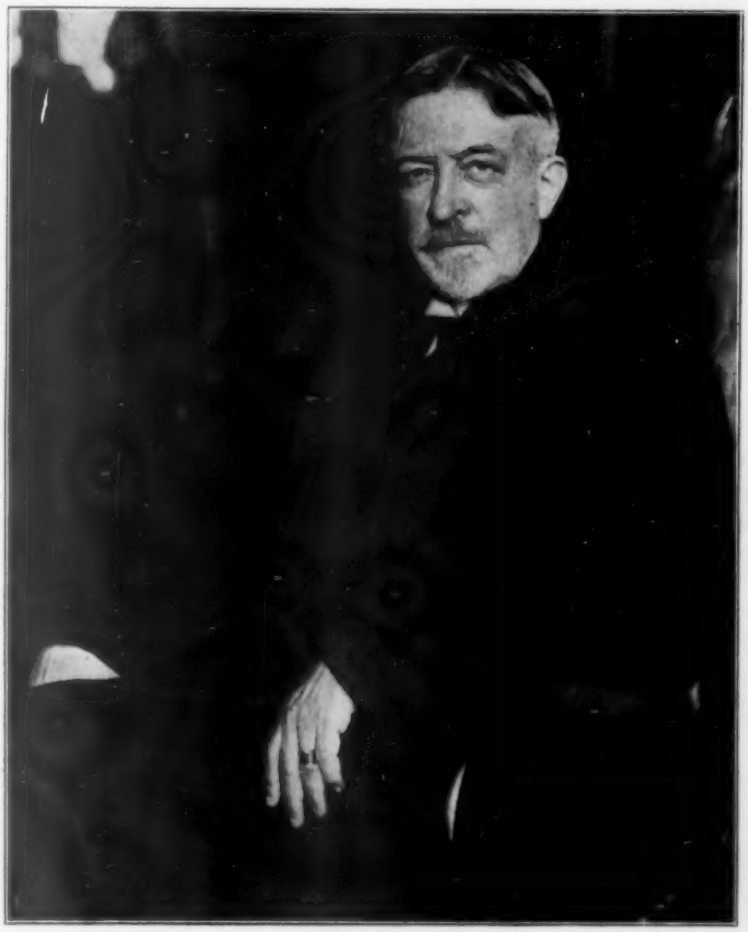
Under no circumstances would he converse outside open Court with an attorney about a case in which the attorney was interested unless some one representing the other side was present. Before being appointed Judge he had been intimate, and in one or two cases associated, with a lawyer who resided in another city. This lawyer had said to him that he liked a Judge who would permit him to stick his feet up on his desk and discuss his cases with him. Shortly after Judge Sanford's appointment he received a letter from this attorney in which the attorney requested that certain action be taken in one of his cases. He wrote the attorney stating that Court would convene in his City on a certain day, and directing that he notify opposing counsel to be present and make his request in open Court.

The esteem in which he was held as a District Judge is well expressed in a letter, a part of which will be hereinafter quoted.

Judge Sanford was anxious for an appointment to an Appellate Court. He disliked the necessity of

imposing punishment upon the many unfortunate offenders, who were tried and convicted before him, and also the necessity of ruling immediately upon the many questions arising in the progress of a trial. He preferred to give mature consideration to every question that he had to pass upon. But two vacancies occurred on the Circuit Court of Appeals, Sixth Circuit, after he became District Judge, and before Mr. Wilson became President. Judge Sanford's name was presented by his friends to the President in connection with the appointment to fill each vacancy, but Tennessee had already had far more than its quota of Circuit Judges. Three Circuit Judges, Baxter, Jackson and Lurton, had been appointed in succession from that State; and Jackson and Lurton had been elevated to the Supreme bench. It, of course, was not expected that President Wilson would appoint a Republican, as all the members of the Court when he became President were Republicans.

President Harding, in his short administration, appointed four members of the Supreme Court.



EDWARD TERRY SANFORD

On May 19, 1921, Chief Justice White died, and as that term of Court was near its close no appointment was made to fill the vacancy until just before the Court convened in October. Because of his eminence and his judicial experience and well known ability Ex-President Taft was appointed by the President as Chief Justice; and was commissioned on October 3, 1921. The next vacancy was occasioned by the resignation of Associate Justice Clarke on September 18, 1922. The President had been associated in the Senate with Hon. George Sutherland, then a Senator from the State of Utah, and had formed a high regard for Senator Sutherland both personally and as a lawyer of great ability. He, therefore, appointed Ex-Senator Sutherland to fill the vacancy; and he was commissioned as Associate Justice on October 2, 1922. Justice Day retired on November 13, 1922. Justice Clarke was a Democrat, while his successor, Justice Sutherland was a Republican; and the Court had but two Democratic members, Justices McReynolds and Brandeis. It is generally recognized that the political party not in power should have at least three members of the Court; and in filling the vacancy created by the retirement of Justice Day, the President gave but little, if any, consideration to a Republican. After carefully considering the various eminent lawyers whose names were presented he sent to the Senate the name of Hon. Pierce Butler, a Democrat from Minnesota. Mr. Butler was regarded as one of the ablest lawyers in the entire Northwest. He had previously represented the Government in important cases arising under the Anti-Trust laws and the Food and Drugs Act.

The next vacancy was occasioned by the retirement under special Act of Congress of Justice Pitney, on December 1, 1922. At that time Mr. Justice McReynolds was the only member of the Court from the South. He was born in Kentucky, and practiced law for a number of years in Nashville, Tennessee, but when he resigned in 1907 as Assistant Attorney General he located in New York, and resided there when appointed Attorney General by President Wilson. Therefore there were grounds for the insistence that he was appointed Associate Justice as a New York lawyer and should be charged to the Second Circuit. There had been but two Republican members of the Court from the South. President Hayes had appointed Justice Harlan from the border state of Kentucky, who was commissioned on November 29, 1877, and remained upon the bench until his death on October 14, 1911, a period of nearly 34 years. President Hayes also appointed Justice William B. Wood, of

Georgia, then Circuit Judge for the Fifth Circuit, who was commissioned on December 21, 1880, and died on May 14, 1887. A number of members of the Court had been appointed from the South since the Civil War, but all others had been Democrats. President Taft had appointed two Southern members, Justices Lurton from Tennessee and Joseph R. Lamar from Georgia. Speaking incidentally President Taft during his administration appointed four District judges in the South, all of whom were Democrats.

It appeared to the friends of Judge Sanford that the conditions were such as amply to justify the President in appointing a Southern Republican to fill the vacancy. He had received in the Electoral College a number of votes from the South, among them the twelve votes from Tennessee.

Primarily it was urged upon the President that Judge Sanford possessed every qualification requisite for the great position. It was also pointed out that the South was entitled to the appointment, and that it would be appropriate to appoint a Southern Republican if one possessing the proper qualifitions could be found. In pressing Judge Sanford's name upon the President, Democrats joined with enthusiasm equal to that of Republicans. The attitude of both Republicans and Democrats was well expressed by an eminent Tennessee lawyer, a Democrat, in a letter voluntarily addressed by him to the Department of Justice. In that letter it was said:

"Without the slightest regard to party affiliations, the people of this State are behind Judge Sanford's application. The Democrats will be as well satisfied with his appointment as if he were one of them. In fact his brand of Republicanism, as manifested in his loyalty to the Constitution and constant efforts to elevate the manhood of this State by an even-handed enforcement of the law, has tended largely to wipe out that prejudice which has kept the Southerner in the Democratic ranks. Every citizen who has served as a juror, every litigant and every lawyer who has been in any of his numerous terms of Court, is a better American citizen today than he was before for this experience. Judge Sanford, as everybody must admit, is qualified by his legal attainments and experience, and by his character for this high position—why should he not be appointed?

"It seems as if his residence as far South as Tennessee is the only thing against him. If so, the South will not be to blame for getting solid again and remaining so. A great many Democrats rejoiced when Mr. Harding carried this State. We thought it better for us in every way. This is the most loyal section of this wide country, and time will prove it when the foreigner gets better control in other states; but is it not a fact that political conditions make us just stepchildren under Republican administrations? It is really fortunate that postmasters and numerous other officials are required by law to live where they serve.

"It is different when Democrats are in power at Washington. Southerners then are eligible for any position within the gift of the President.

"We want to have Judge Sanford appointed, and that is our consideration. If he is not, then it should be candidly understood that the South has no place in the Republican party because of political conditions that the President must recognize. In other words the Solid South is a political and not a sectional evil as is constantly being charged. You will see from this that it is not conducive to good humor when a man like Judge Sanford must be sacrificed to the policies of his own party, and it is due to him that no other reason be given for cutting him down."

It is believed that Judge Sanford had the earnest support of every lawyer and every prominent citizen in the Districts in which he held Courts. In addition to this he was well and favorably known to many influential citizens in the South outside his Districts, and to many prominent men throughout the United States. After a most careful consideration the President announced in the press that he had determined to appoint Judge Sanford as Associate Justice. The names of many other prominent Judges and Attorneys had been pressed upon the President; and when this announcement appeared many protests were made to the President by the friends of the other applicants. The appointment was withheld for some time—a sufficient length of time to create uneasiness among Judge Sanford's friends. Apparently the appointment was withheld because of rather strong criticism by some Senators, who had endorsed other applicants, directed at the Chief Justice, who they asserted was dictating appointments. This was denied by the Chief Justice; and a few days later Judge Sanford's name was transmitted to the Senate; and the appointment was confirmed without question.

It is doubtful whether any President ever gave more careful consideration to the qualifications of appointees to the Supreme bench than did President Harding.

Justice Sanford's services upon the Supreme Court terminated so recently, and the actions of the Court are so closely followed by the Bar generally that but little comment need be made upon his record as a Justice. His scholarly training is manifested in his opinions. Expressed in purest but simple English, with the facts and discussion of the law developed in logical order, they are models of literary style.

That he favored the strict enforcement of the Anti-Trust laws is indicated by his joining with the Chief Justice and Mr. Justice McReynolds in dissenting from the opinions of the majority in the cases of Maple Flooring Manufacturers' Association vs. United States (268 U. S. 563, 586), and Cement Manufacturers Protective Association vs. United States (268 U. S. 587, 606). Those cases were actions brought by the Government to enjoin specified activities of trade associations, and had been decided by the Courts below in favor of the Government. The majority of the Court took the view that the activities described and proven did not violate the act.

Perhaps as hotly contested constitutional controversy as was before the Court while Mr. Justice Sanford was a member, related to certain State Statutes, which it was insisted unduly restrained the right of free speech. Gitlow vs. New York (268 U. S. 652) was a criminal prosecution under a New York Statute defining Criminal Anarchy, and declaring it a criminal offense for any person by

word of mouth or writing to advocate, advise or teach the duty, necessity or propriety of the activities stated in such definition by printing, publishing, issuing or knowingly circulating any book, paper or document advocating, advising or teaching the doctrines defined as Criminal Anarchy. It was shown that Gitlow as a member of the Left Wing of the Socialist party did participate in publishing and distributing a Manifesto, which clearly fell within the definition of Criminal Anarchy, but there was no evidence of any effect resulting from its publication and circulation. In the opinion prepared by Justice Sanford and concurred in by the majority of the Court it was held that it was sufficient to prove that the defendant had participated in the publication and circulation of the document, that "such utterances, by their very nature, involve danger to the public peace and to the security of the State," and that "The State cannot reasonably be required to measure the danger from every such utterance in the nice balance of a jeweler's scale." The minority took the view that to fall outside the protection of the constitution the words must be "used in such circumstances and are of such nature as to create a clear and present danger that they will bring about the substantive evils the State has a right to prevent."

A similar question arose and was disposed of in the same manner in an opinion prepared by Justice Sanford in Whitney vs. California (274 U. S. 35), which involved the Syndicalism Act passed by the Legislature of California.

But along with the opinion in the Whitney case he handed down an opinion in Fiske vs. Kansas (274 U. S. 308), in which the validity of the Syndicalism Act of Kansas was drawn in question. The indictment set forth the language contained in the preamble of the Constitution of the Industrial Workers of the World, and on the trial the State offered no evidence as to the doctrines advocated by that organization and the defendant, other than a copy of such preamble. The Court found that there was nothing in the language which warranted the Court or jury in ascribing to it as an inference of law or fact, "the sinister meaning attributed to it by the State," and therefore held that the Statute in so far as it was construed by the State Supreme Court as applicable to the state of facts proven was an unwarrantable infringement upon personal liberty.

In United States vs. Schwimmer, 279 U. S. 649, 655, Justice Sanford concurred with Justice Holmes and Brandeis in dissenting from the holding of the majority that Miss Schwimmer should be denied naturalization, because in answering the question: "If necessary, are you willing to take up arms in defense of this Country?" she said, "I would not take up arms personally"; although it was shown that she was a woman of the highest character and entertained the highest ideals of a democratic republic, and could whole heartedly take the oath of allegiance.

A careful perusal of the opinions written by Justice Sanford, and also of the dissenting opinions with which he concurred, shows he did not believe that the Constitution was intended to be a cast iron corset or a rope of sand, but by sensible interpretation it should be adjusted to new conditions as they arise in the progress of civilization. He was neither a reactionary nor a radical, but was one of the large majority of the Justices of that great judicial body who from generation to generation have occupied consistently the middle of the road. And the force thus wielded has guided our Nation along a safe path; and has caused that body to be regarded as the key of the arch which supports, and insures the preservation of, our Republic.

THE LAW SCHOOL IN THE SPECTROSCOPE

THE student upon graduation from law school stands at the crossroads.[1] At such time he is wont to pause and take stock, to evaluate the results achieved by his law school training, and to pass critical judgment upon the modus operandi of its teaching. These reflections may bring him to one of two decisions: (one) the problem of legal education has been solved and has been carried satisfactorily to its objectives; or (two), there is occasion for modification of the particular course adopted or necessity for trying another.

The neophyte who comes to law school is not too carefully prepared for his undertaking. His cultural background, though multiple faceted, lacks a proper blending, and requires polish. Primarily he has acquired a certain measure of knowledge, uncorrelated, diversified,—much of it relegated to the sub-conscious mind and rarely stimulated. The member of the bar, at the other extreme, who has gained the respect of his profession and of society in general, is a more complicated individual to estimate. The prism of the legal spectroscope breaks up for us his component elements: An ability to analyze, a knowledge of substantive law, an appreciation of the traditions of the legal profession, a proper understanding of the position of law in relation to society, a broad cultural training and a sense of humor. These are the visible portions of the elements, but by no means represent the whole spectrum, since its components extend in both directions far beyond the regions which can be reached by the eye.

The critic must, however, recognize that it is unreasonable to expect a three-year training to run the gamut of the spectrum. The law school is not required to take the initiate and produce a completely finished product. It must seek to cultivate essential elements; to construct a firm foundation so that other elements may ripen and be mellowed with time.

Although the pre-law curriculum is beyond the scope of this paper its guidance is within the province of the law school's jurisdiction and war-

1. The criticisms herein expressed represent the consensus of opinion of a majority of the Gowen Fellows, 1930-31, at the University of Pennsylvania Law School.

rants careful study by the officials. They are the best judges as to the ante-natal care required by the embryonic law student. Proper supervision, we are told, insures healthy offspring and guards against untoward development. The significance of this cursory analysis of the problem lies in the fact that it furnishes the framework for a consideration of the means that have been employed in the attaining of the desired objectives.

With reference to the ability to think, to analyze and to apply old rules to new ramifications as they arise, the law school training must be vitally concerned. The importance of the capacity to analyze is not to be underemphasized. Especially is this true with the first year student. He must be taught how to think, how to reason problems through to conclusions, logical and practical, if perchance he has flitted through life careless and unconcerned; he must be taught how to evaluate component elements, to discard the unimportant or identical propositions, if perchance he has never learned to appraise. To this end the case-method in the first year is peculiarly fitted. Due credit must be given it. Under this method, the student emerges at the end of the first year sufficiently adroit for the handling of the foils.

With reference to an adequate supply of knowledge required of the accomplished attorney, the question arises as to whether the present handling of the case-method is adapted to this end. Methodology, because of its dynamic and mobile nature, perforce defies formula and permanent standardization. This the disciples of Langdell have almost totally forgotten. They fail to recognize sufficiently the necessity of inaugurating each course with an historical survey, a development of some fundamental concepts,—the course's relation to social and economic life, with a view to creating a workable, though not necessarily a complete, "apperceptive mass," to enable the student to treat more inquiringly the materials of the course.

Noteworthy, also, is the lack of sufficient correlation in the courses. It is not often in practice that a question may be pigeon-holed completely within one of our classical categories. More likely, undercurrents of conflicts, corporations and receiverships will be brought into play simultaneously. As a rule, the student passes through law school almost totally oblivious of this lack of correlation. Occasionally, however, when the effort is made in his instruction to show the interrelationship of various fields, the student acquires a certain sense of satisfaction in being able to follow the particular doctrine in its application to various other courses, as well as a better understanding of the main subject itself.

Of major importance is the necessity of decreasing the insistence upon analysis and increasing the emphasis laid upon knowledge of substantive law in the second and third year courses. Cases assigned primarily for the former element should, in great measure, be eliminated. The introduction of statutes will allow for some attention to their interpretation and significance. Legal problems, aside from decided cases, will help minimize the overemphasis on the case-system. Occasionally (shades of Langdell!) the lecture and text-book method may be employed to cover certain phases. Unpardonable should be the failure to complete large important sections of a subject. Within the reach of the students more elective courses should be placed. This can be rendered possible by a compression of some of the so-called major courses, whose appearance in the curriculum of most of the law schools is noted in the report of the Committee on Curriculum of the Association of American Law Schools (Dec. 1930). The question is not solely whether a given subject is fully treated. The adoption of the present case-system admits that this is not a sole objective. Rather is the problem whether a more sane balance might not be created between substance and analysis, yielding a more careful attuning to the requirements of practice.

Concerning culture and appreciation of tradition much might be said. The latter, embracing the code of ethics, is engendered by the law school, and captures the young legal barbarian and all unconsciously to himself moulds and shapes him. The submission is voluntary, groomed by a high minded legal training.

As for cultural courses, most of them must be relegated to the pre-law curriculum, albeit the heat of contemporary study, it has been said, would more adequately fuse the two bodies of knowledge. A definite need is felt by a certain few of the students, however, for a course in law school in Legal History and Jurisprudence. It is not enough to say that "there are notable volumes of Pollock and Maitland, Holdsworth, Jenks, Vinogradoff, Holmes, Thayer, Ames and Bigelow." The student must be guided through the field. He must acquire an ability to weigh the features of our own system by a comparative view of the leading ones of the world. A charted course will indicate that traditional common law is not immutable, or immune from the contemporary economic and social needs of the people. The ideas which underlie the infinite variety of legal rules become more understandable in the light of the comprehensive views taught in Jurisprudence. For such a study the student must have a background so that he may the better appreciate its value. To speak of the "functional approach" or the "abuse of concepts," or of a system "based upon life and not upon logomachy" requires a legal mind more mature than that found in the novitiate. Perhaps the time is not ripe until immediately preceding or during the final year.

These observations are not meant to be all inclusive. They are subject to experimentation and the test of time. Might we not ask of the law school educator of today a similar resiliency? The writer is not deluded by the belief that it is possible to formulate a rigid theory relating to a system of legal education. Some questions are never solved. Lord Eldon's homely phrase "to live like a hermit and work like a horse" still has its adherents among legal educators. But the student, his critical faculties whetted by the difficulties encountered, may have discovered gaps or inconsistencies in his training. His elders may find in his heresies some basis for reanalysis and reformulation of the problems involved.

JOSEPH FIRST.

ARRANGEMENTS FOR FIFTY-FOURTH ANNUAL MEETING

To Be Held at Atlantic City, N. J., on Thursday, Friday and Saturday, September 17, 18 and 19, 1931

HEADQUARTERS: Atlantic City Municipal Auditorium. This auditorium is the finest building of its kind in the United States. It will be used for general headquarters purposes, including registration, meetings of Sections and Committees, and for the general sessions of the Association.

Section meetings will be held on Tuesday and Wednesday, September 15 and 16. Further announcement will be made in a later issue of the JOURNAL.

Because of the excellent facilities afforded by the auditorium, headquarters will not be maintained at any hotel. Arrangements have been made with the Atlantic City hotels to provide adequate accommodations for the members of the Association who will attend the meeting. Reservations in hotels listed will be made as usual through the Association's office. Requests should be addressed to the Executive Secretary, 1140 North Dearborn street, Chicago, Illinois. The following accommodations are available:

BOARDWALK HOTELS		Rates by the Day Rooms with Private Bath For 1 Person		For 2 Persons	
Chalfonte-Haddon Hall	A	$ 9.00 to	$12.00	$16.00 to	$22.00
	E	4.00 to	8.00	7.00 to	10.00
Ambassador	E	5.00 to	10.00	8.00 to	12.00
Traymore	A	10.00 to	20.00	16.00 to	26.00
	E	6.00 to	16.00	8.00 to	18.00
Marlborough-Blenheim	A	10.00 to	14.00	16.00 to	28.00
	E	6.00 to	10.00	8.00 to	20.00
Dennis	A	...	...	14.00 to	18.00
President	A	7.00	...	12.00	...
	E	4.00	...	6.00	...
Ritz-Carlton	E	5.00 to	8.00	7.00 to	16.00
Shelburne	E	5.00 to	7.00	8.00 to	12.00
Brighton	A	8.00 to	12.00	16.00 to	24.00
	E	5.00 to	9.00	10.00 to	18.00
Knickerbocker	A	8.00 to	12.00	12.00 to	18.00
	E	4.00 to	8.00	6.00 to	10.00
Chelsea	A	8.00 to	11.00	16.00 to	20.00
	E	5.00 to	7.00	8.00 to	12.00
New Belmont	E	4.00 to	7.00	5.00 to	8.00
Apollo	E	3.50 to	5.00	6.50 to	10.00

AVENUE HOTELS		Rates by the Day Rooms with Private Bath For 1 Person	For 2 Persons
Morton	A	$ 7.00 to $ 9.00	$12.00 to $15.00
Colton Manor	A	... ...	12.00 to 15.00
	E	... ...	6.00 to 9.00
Madison	A	8.00 ...	15.00 to 16.00
	E	5.00 ...	9.00 to 10.00
Ludy	A	6.00 to 10.00	9.00 to 16.00
	E	4.00 to 7.00	5.00 to 9.00
Galen Hall	A	7.00 to 9.00	12.00 to 16.00
Craig Hall	A	7.50 to 9.00	11.50 to 13.00
	E	3.50 to 4.50	4.50 to 5.50
Jefferson	A	6.00 to 8.00	12.00 to 14.00
	E	3.50 to 5.00	7.00 to 9.00
Raleigh	A	6.00 to 7.00	12.00 to 14.00
	E	3.50 to 4.00	5.00 to 6.00
Flanders	A	6.00 to 7.00	10.00 to 12.00
Wiltshire	A	6.50 to 7.50	11.00 to 14.00
	E	4.00 to 5.50	5.00 to 7.00
Plaza	A	5.00 to 6.00	10.00 to 11.00
	E	3.00 to 4.00	5.00 to 6.00
Stanton	A	... ...	10.00 to 12.00
Penn-Atlantic	E	3.50 to 4.00	6.00 to 7.00
Elberon	E	4.00 to 6.00	6.00 to 9.00
Kentucky	E	2.50 to 3.00	4.50 to 5.50

Glaslyn-Chatham	A	6.00	...	12.00	...
Arlington	A	6.00 to	8.00	10.00 to	12.00
	E	4.00 to	6.00	6.00 to	8.00
Monticello	A	6.00 to	7.00	11.00 to	12.00
	E	3.50 to	4.00	5.00 to	6.00
Lafayette	A	7.00 to	8.00	12.00 to	14.00
	E	3.50 to	4.00	6.00 to	7.00
Thurber	E	...	2.50	3.00 to	5.00
Franklin	E	3.00 to	3.50	6.00 to	7.00
Grossman's	A	9.00 to	11.00	16.00 to	18.00
Sterling	A	6.00 to	8.00	12.00 to	14.00
	E	3.50 to	6.00	5.00 to	8.00
New Richmond	E	3.50 to	4.00	5.00 to	6.00
Devonshire	A	6.00 to	7.00	11.00 to	12.00
	E	3.50 to	4.00	5.00 to	6.00
Eastbourne	A	...	...	12.00 to	14.00
	E	4.00	...	6.00 to	7.00
Clarendon	A	6.00 to	7.00	11.00 to	12.00
	E	3.50 to	5.00	6.00 to	7.00
Gerstel's Lelande	A	6.50 to	7.00	13.00 to	14.00
	E	3.00 to	5.00	5.00 to	7.00
Cheltenham-Revere	A	6.00	...	12.00	...
	E	2.50	...	5.00	...
Carolina Crest (Continental Plan)		4.00 to	5.00	8.00 to	10.00
Continental	E	4.00 to	6.00	7.00 to	8.00
Maples	E	...	...	5.00 to	6.00
Grand Atlantic	A	5.50 to	6.50	11.00 to	12.00
	E	3.00 to	4.00	6.00 to	7.00
Trexler	A	5.00	...	9.00 to	10.00
	E	3.00	...	4.00 to	5.00
Delaware City	E	3.00 to	4.00	4.00 to	5.00
Louvan	E	...	...	7.00	...

NOTE: In the list of hotels A stands for the American Plan (with meals), E for the European Plan (without meals).

In addition to the above hotel rooms, all with bath, there are available rooms without bath, which rooms will be reserved on request. Rates are, of course, somewhat lower on rooms without bath.

To avoid unnecessary correspondence, members are urgently requested to be specific in making requests for reservations, stating hotel desired, number of rooms required, names of persons who will occupy the same, rate, whether European or American plan, and arrival date, including definite information as to whether such arrival will be in the morning or evening.

Reservations should be made as early as possible.

National Conference of Commissioners on Uniform State Laws, to Be Held at Hotel Haddon Hall, September 8-14, 1931

The Conference will be held in Atlantic City, September 8-14, 1931. The sessions will be held at Haddon Hall, where headquarters will be maintained beginning Tuesday, September 8th. Applications for hotel reservations should be made to the Executive Secretary of the American Bar Association, 1140 North Dearborn Street, Chicago, Illinois.

Cleveland Bar to Entertain Canadian Lawyers

A LARGE delegation of Canadian lawyers, mostly from Toronto, will arrive in Cleveland on May 5th to join with The Cleveland Bar Association in an international meeting of the two organizations, according to a recent announcement by President Luther Day, of The Cleveland Bar Association. The Executive Committee of the Association recently adopted a resolution extending a formal invitation to the Canadian lawyers to attend, and plans already are under way in Canada for the visit of the delegation, which will include some of Canada's most distinguished jurists and lawyers.

One of the most important events of the day will be an investiture ceremony, in the course of which the Canadian lawyers will present robes to the Judges of the Court of Appeals, who have acted favorably on the request of The Cleveland Bar Association that they wear these robes while on the Bench.

IMPORTANT WORK OF UNCLE SAM'S LAWYERS

Chief Justice Hughes, in Address at Dinner of Federal Bar Association in Washington on Feb. 11, Speaks of Extraordinary Development of Administrative Agencies of the Government and of Lawyer's Part in Making Them Work Satisfactorily and also in Protecting Public Against Bureaucratic Excesses

I READ the other day that a distinguished judge had observed that there were more lawyers *per capita* in the City of Washington than in any other place in the country. I had thought that New York City held what many may regard as the unenviable record in this respect. But the fact is not surprising. The irreverent might say that, where the carcase is, there will the eagles be gathered together. I should prefer to find the explanation in the fact that this is the Eagle's nest and that it is well defended. The attorneys who come to Washington in the interest of individual clients find the Government well fortified with outlying battalions of lawyers who represent the various departments and guard the approaches to the inner citadels of administration. As the beleaguering armies become more numerous, the stronger become those of defense. Each side, it may be observed, raises the banner of liberty, and the paradox is that the interests of constitutional liberty appear to demand that neither force shall be fully triumphant, but that through the balanced contest we shall have the blessings of peace without the discomfiture of either public or private right.

If some of you feel that you have fallen upon especially evil days, you may find comfort as well as sound advice, in the utterances of eminent pessimists of the past. It was ninety-five years ago, in 1836, that Chancellor Kent addressed these words to the Law Association of the City of New York:

"I am induced to press these considerations upon young and ardent minds as I apprehend the tendency of things at present is to disenchant the profession of much of its attraction. We live in a period of uncommon excitement. The spirit of the age is restless, presumptuous and revolutionary. The rapidly increasing appetite for wealth, the inordinate taste for luxury which it engenders, the vehement spirit of speculation and the selfish emulation which it creates, the growing contempt for slow and moderate gains, the ardent search for pleasure and amusement, the diminishing reverence for wisdom of the past, the disregard of the lessons of experience, the authority of magistracy and the venerable institutions of ancestral policy, are so many bad symptoms of a diseased state of the public mind. It will require a most determined perseverance and firmness of purpose, and the most devoted zeal in the rising members of the Bar to resist the contagion, and pursue triumphantly the rewards and honors of professional reputation."

Despite the pertinency of these words, both then and now, you may still find consolation in the record of the nearly one hundred years that have passed since they were spoken. The truth is that the development of institutions gives constant opportunity for the renewal of old anxieties in new relations. I am fond of quoting the sage remark of that acute philosopher, George Santayana, that what truly matters is that "we should carry on perpetually, if possible with a *crescendo*, the strenuous experience of living in a gloriously bad world, and always working to reform it." He adds that we never can succeed in the sense of rendering reform less necessary, or life happier, and that in such measure of partial success as may attend particular efforts, we may even thereby be "sowing the seeds of new and higher evils to keep the edge of virtue keen." That is the great work of the Bar in promoting and opposing, in disputing, conciliating, and deciding, "to keep the edge of virtue keen."

As Uncle Sam's lawyers, you reflect the extraordinary development of the administrative agencies of government. To some, you may appear to be living symbols of bureaucracy. I think that, if in your special tasks, representing the greatest of all clients, you are true to the standards of your profession, you may well turn out to be the protectors of society from bureaucratic excesses.

Vexed with a multiplicity of laws, observing the defects in the administration of justice, finding himself subjected to delays and sometimes heavy expenses in vindicating his rights under uncertain laws, it is small wonder that the victim cries out against law itself. But whatever reason there may be for dissatisfaction in particulars, the law is the vital breath of democratic institutions. It represents the accepted principle, the adopted rule of action. The essence of the matter is that we escape the unbridled discretion of despotic rulers only by the restrictions which constitute the reign of law. As William Pitt sententiously observed, "When law ends, there tyranny begins." And it is our business to see to it that when law begins, tyranny shall end. The just balance is to be found in democracy, or under the constitutional system of our republic, in making the rules of society, which we call law, responsive to common sense.

Simple as this is in theory, it is most difficult in practice and the art of government of the people, by the people and for the people, is the most difficult of all arts. In the days of less complicated conditions, it was the accepted view that legislatures were equal to their task of law-making, and that in their occasional sessions they could provide all the rules that were necessary. But, despite the inordinate multiplication of laws, which has been especially characteristic of recent times, the legislatures have not been able to keep pace with social demands, and they have adopted the practice, after the formulation of some very general standards, of turning over the business of regulation to a great

variety of administrative agencies. The making of regulations, is, of course, essentially legislative in character, for they set forth what the citizen may and may not do. We are thus confronted with the distinctive development of our era, that the activities of the people are largely controlled by government bureaus in State and Nation. It has well been said that this multiplication of administrative bodies with large powers "has raised anew for our law, after three centuries, the problem of executive justice"; perhaps better styled "administrative justice." A host of controversies as to private rights are no longer decided in courts. Administrative authority, within a constantly widening sphere of action, and subject only to the limitations of certain broad principles, establishes particular rules, finds the facts, and decides as to particular rights. The power of administrative bodies to make findings of fact which may be treated as conclusive, if there is evidence both ways, is a power of enormous consequence. An unscrupuluos administrator might be tempted to say "Let me find the facts for the people of my country, and I care little who lays down the general principles."

We all recognize that this development has been to a great extent a necessary one. Activities of vital importance to the public could not be left unregulated where legislatures were powerless to supply the details of regulation. Experience, expertness, and continuity of supervision, which could only be had by administrative agencies in a particular field, have come to be imperatively needed. But these new methods put us to new tests, and the serious question of the future is whether we have enough of the old spirit which gave us institutions to save them from being overwhelmed.

In this new dispensation the service of the lawyer becomes more than ever indispensable. In the early days it was the fearless lawyer, standing in the dignity and authority of his profession, unabashed and determined, before tyrannical judges prone to abuse judicial prerogatives, who vindicated essential liberties and secured for us our happy tradition both of judicial independence and judicial responsibility. So today, it is to the well-trained, learned, and experienced members of the Bar justifying the trust reposed in them, and representing their clients with honorable zeal, that the individuals of the community must continue to look for protection against every encroachment upon individual rights. The more intricate the activities of a closely knit population, the more involved the maze of statutes and regulations, the more essential is the close and continuous study of the law, and the bringing of an expert and discriminating judgment to the careful assembling and presentation of facts which constantly appear in novel complexities.

But, in enjoying this privilege of meeting with the members of the Federal Bar Association, composed largely, if not altogether, of those retained by the Government to aid it with expert and legal assistance in its various departments, I am thinking especially of your service as lawyers for the organized community. If our administrative systems are to work satisfactorily, it must be by your aid, and I am glad of the opportunity to reenforce your appreciation of the dignity and responsibility of your calling. Where in our profession are there higher standards and where should there be greater inducement to live up to them! In your departments, you are the interpreters of the law, not in selfish interest but in the public interest. You are not the employees of officers but of the Government. You are not the wards of politicians but the guardians of society. You are the servants of the laws and not of men. It is not your privilege to bend or distort the law to serve either public or private ends but to administer the law as it is. You deal with its unavoidable complications; you seek to resolve its ambiguities; you subject the endless and sometimes burning controversies that come before you to cool and impartial analysis. You give no favors and you fear no antagonists; you unmask pretensions, expose fallacies, and frustrate evasions. That is your high calling as Uncle Sam's lawyers, and I congratulate you upon your client and your opportunities, but only as you measure up to them by unswerving loyalty to the law. It is in this sense that I find in your expert, astute and high-minded efforts the saving salt of administration, the protection against those stretchings of the law which give play to tyrannical impulses, and against the abuses deflecting administration through political policy or favor.

How difficult it is to secure legislation that is simple and unequivocal! To the business man writing a letter or an ordinary business contract, to a judge writing an opinion, a sentence may seem to be clear and exact, and yet in the light of some unexpected situation, how strangely ambiguous it becomes!—the breeder of controversies rather than of settlements. Clarity! the greatest of legislative and judicial virtues, like the sunshine, revealing and curative. For example, I think we have an extremely well administered tax system. Our revenue laws are the subject of close study and are drafted by experts. We have elaborate provision for consideration of claims. And yet, despite this care and expertness, how many problems arise from little clauses apparently simple and innocuous? Notwithstanding the host of controversies that never get beyond the departments, government cases crowd the calendars of our courts. And I am not speaking of criminal prosecutions.

The solicitors in the various departments may render, and I think are rendering, an important service in keeping down the volume of litigation by not attempting to force statutes to an extreme construction and by a willingness to take a reasonable measure of responsibility and thus to avoid the placing of an unnecessary burden upon the courts. There is abundant opportunity for good sense even in administering laws. The Department of Justice, under its able head, has been making a most admirable record in this respect. I noted, in the last report of the Attorney General, that during the past fiscal year, the Solicitor General authorized applications to the Supreme Court for certiorari in only 27 cases out of 217 that were considered. Notwithstanding this commendable care, the inevitable pressure of governmental work gives the Government a very large proportion of the cases in the Federal Courts. In the Supreme Court of

the United States, after all the sifting out ot controversies that do not belong there, it appears that in the term of 1928, the United States cases were 28.5 per cent. of the calendar; in 1929, 36.5 per cent.; in 1930, 40 per cent.

Whether at the Bar or on the Bench, I have observed with satisfaction the ability drawn to the service of the Government, despite the hard work at small pay. When as a lawyer, one is opposing the Government, he is none the less glad to see the business of the Government handled with conspicuous competency. And as many of you are young men winning your spurs, let me advise you to be mindful of your argument and not of your opponent. A young man who has a good argument has nothing to fear from any top-notcher at the Bar. You may remember what Dr. Johnson said: "Nay, sir—argument is argument. You cannot help paying regard to their arguments if they are good." Nor, in your early efforts, need you be distressed because of a natural trepidation. That you may never be able to overcome. Cicero tells us that he never overcame it. He says: "I, who as all men know, am so much concerned in the Forum and the courts of justice, that there is no one of the same age, or very few, who have defended more causes, and who spend all my time which can be spared from the business of my friends in these studies and labors, in order that I may be more prepared for forensic practice, more ready at it, yet, (may the gods be favorable to me as I am saying what is true!) whenever the thought occurs to me of the day when, the defendant having been summoned, I have to speak, I am not only agitated in my mind, but a shudder runs over my whole body." Such trepidation may often be, as in his case, the natural forerunner of the persuasive utterance coming from one aflame with the thought that kindles a responsive interest in his hearers. If you seek to be eloquent, let it be the eloquence of the thinking man, not the outburst of one whose passion has disarranged his thinking apparatus. If you are exact in your thinking processes, you will go as far as the gifts of Providence permit, although few may be able to emulate the example of Lincoln who, as has well been said, "learned to do a most difficult thing—to produce literature on his legs."

As you leave the service of the Government, as probably many of you will in the course of time, I believe that you will always carry with you the memory of the distinction of that service and a special sense of loyalty to the law, which is the abiding strength of the truly successful practitioner and advocate whether in private or public affairs.

Today, our thoughts turn to the lawyer and statesman who illustrated the finest type of both. Lincoln was much more than an able lawyer, but the quality of mind, which made him successful at the Bar was conspicuously shown in statecraft. He was more than shrewd. We erect no monuments to shrewdness. He was fair and thorough. Whenever he addressed himself to a question, he penetrated to the heart of it; he was analytical and precise. He was instinct with love of humanity, but this did not leave him in a sentimental fog. From his earliest public utterances, he emphasized the importance of a dispassionate, realistic viewpoint in public affairs. "Passion," he exclaimed, "has helped us but can do so no more. It will in future be our enemy." "Reason must furnish all the materials for our future support and defense."

He was self-taught, but in himself he had the ablest and wisest teacher of his time. And his self-instruction was never finished. When, already a leader of the Bar in Illinois, he listened to a most skilful argument in a patent case, Lincoln said: "I am going home to study law." And the studies which he carried on with fresh intensity more fully prepared him for the unprecedented tests to which he was about to be subjected.

He hated chicanery. Strong in contest, he loved the processes of peace. "Discourage litigation," he said, "Persuade your neighbors to compromise whenever you can. As a peacemaker, the lawyer has a superior opportunity of being a good man."

Honest, sagacious and conciliatory; astute and humane; eloquent, with simplicity and candor, he embodies the Nation's ideal. In every department of government, in every vocation, in every emergency, one can do no better than to seek to measure up to the standard of action which Lincoln nobly exemplified and proclaimed in imperishable words: "Let us have faith that right makes might, and in that faith let us to the end dare to do our duty as we understand it."

Plans to Regulate Solicitors' Practice in England

TWO bills for regulation of solicitors' practice have been presented to Parliament, according to the London Law Times of Feb. 7. One has been drafted by the Council of the Law Society and its central idea is that all solicitors shall be members of the Law Society and that the Society shall be empowered to make rules for the conduct of practice. The rules now in contemplation, in the event the measure passes, will, we are told, probably provide that every solicitor shall keep a proper account by which his money and his client's money may be distinguished. It is also proposed to enable an inspector to look at solicitors' accounts and report to the Council whether they are being properly kept. The Council will, of course, have power to require an explanation of any failure to comply with the rule and, if necessary, to insist upon the alteration of a faulty method of keeping books. The other bill proposes an audit by a chartered accountant. Both measures are expected to go before a joint committee of both Houses of Parliament, which will hold hearings on them.

Speaking of the proposed measures at a recent meeting of the Law Society, Sir Roger Gregory, President of the Society, alluded to plans for protecting clients against losses on funds entrusted to solicitors. The question of insurance, he said, presented many obstacles but the Society was prepared to give the joint committee on it all the information that they required. He hoped that an "alleviation fund" would be started for the benefit of smaller victims of defalcation. Such a fund, in his opinion, would enhance the prestige of the Society and should be quite considerable if the membership were increased as the bill proposed.

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JOSEPH R. TAYLOR,
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"WE LIVE BY ADMIRATION, HOPE AND LOVE"

The tributes to Mr. Justice Holmes on his ninetieth birthday illustrate not only the unique place he has made in the history of the profession but also certain outstanding traits in the profession itself. It is doubtful if in any group of men, professional or otherwise, there is so great a readiness to recognize high ability and to give full expression to the pride and pleasure which a man's fellows feel in a career of notable achievement.

It may be taken as certain that the members of the Bench and Bar throughout the country associated themselves fully with the tributes to Mr. Justice Holmes that were so aptly paid by Chief Justice Hughes, President Boston of the American Bar Association, and Dean Clark, of the Yale Law School. And their pride and pleasure was not only in the judicial achievement and the profound scholarship of the man so honored, but also in the fact that he represents in an eminent degree the lawyer who is also the man of culture and broad interests, the scholar who has never lost the common touch, the well-rounded, well-balanced character, which seems to realize the old Greek ideal of "nothing in excess."

Naturally few of the things said on this occasion were particularly new to Mr. Justice Holmes. He became an institution long ago, and his work, his character, his philosophy have had numerous comments in legal periodicals and even in the lay press. The volume of articles about him which was presented on this occasion by Prof. Felix Frankfurter contains interesting selections from this abundant material. But in spite of his well known modesty which, we are told, rather caused him to wonder why all the fuss should be made about him, he could hardly fail to be impressed by this hearty and spontaneous outpouring of respect and affection from his brethren.

The profession takes care of its own. It gladly renders the tribute of praise and admiration not only to the living, as it has just done, but also to those who have passed away. And it not only endeavors in fitting ways to commemorate the character and achievements of those who are great in the widest fields but also of those who have labored, "not with lost toil," in more modest positions. Every now and then one sees in the press a notice of the presentation by the Bar of a portrait of some local judge, who has gone and left behind rich memories of fidelity to duty and of ability in its discharge, or of some other manifestation of the profession's affection and respect for those who have nobly played their part.

As long as this appreciation of the noblest and the best is so marked a characteristic of the Bar as a whole, no one need fear that its problems will remain unsolved or its great traditions be forgotten. "We live by admiration, hope and love," and when these are well and wisely fixed, the future stands secure.

MAINTAINING THE SEPARATION OF POWERS

The Illinois Supreme Court's decision declaring unconstitutional the legislative act purporting to make juries judges of the law as well as of the facts is placed on a broad basis which makes it a noteworthy event in the general movement to maintain the integrity and completeness of the judicial power.

The Court, in an opinion by Mr. Justice DeYoung, declares the act in conflict with the state constitution in two particulars. In his words, it "abrogates an essential attribute of the trial of a criminal case by a jury as known to the common law and results in the deprivation of a right which has been uniformly guaranteed by our successive constitutions." Furthermore, the statute is declared to be an attempted interference by the Legislature with the Judicial Department, in plain violation of the third article of the Constitution, which establishes

the familiar division into departments and forbids any interference by one with the functions of the other, except as expressly directed or permitted by the Constitution.

According to the commentaries on the Code of Criminal Procedure adopted by the American Law Institute, there are only three states whose statutes announce the extremely illogical and impracticable principle that the jury shall be judges of the law and the fact—if we except the matter of libel. On the other hand, there is a long list of statutes providing the opposite rule. The real importance of the decision, therefore, lies in the assertion on constitutional grounds of the exemption of the judicial power from legislative tinkering. Constitutional provisions of like import are almost universal in the country and should be capable of further application in almost every state as well as in the Federal judicial field to maintain the autonomy and independence of the judicial power.

Abrogation of the statutory provision making juries the judges of that which they are incapable of judging was one of the recommendations of the Illinois and Cook County Judicial Advisory Councils. The Bulletin of the Illinois State Bar Association recently stated that a bill eliminating this injurious provision had been prepared for presentation to the Legislature. The Supreme Court, however, has rendered the resort to the lawmakers unnecessary and has thus left them more time to devote to matters peculiarly within their constitutional province.

THE WORK THAT COUNTS

The following extract from the address delivered by Hon. Elihu Root on the occasion of the recent opening in New York City of the new building of the Council on Foreign Relations sets forth a truth that applies not only to the improvement of international relations but also to any other great undertaking in the public interest:

"I came not to make a speech but to respond to a call. For a great many years, now, I have taken an interest in the kind of thing that you are undertaking to do, and I take a special satisfaction in the opening of this house. The laying of one brick doesn't create any very great disturbance, but without it, how would you have your house? I think the first thing that impresses me as an immediate lesson from the establishment of this building and the centering of the work of the Council on Foreign Relations here, is that it indicates an appreciation of a truth very widely neglected, and that is that the work of improving the foreign relations of civilized man is necessarily very slow and laborious and difficult, and that anyone who is going to contribute materially to it must settle down to steady, continuous and unspectacular labor. The making of great speeches, the writing of brilliant articles or impressive books, even the occasional meetings of specially trained men, are not enough.

"I think about the worst enemies of improvement in the relations of the nations are the people who are impatient, the people who are in a hurry, who want everything done at once and who, unless they can see in anything that is proposed an immediate result, say, 'Oh, well, it doesn't amount to much.' These people who are in a hurry are a serious obstacle to the accomplishment of something by people who are willing to take the necessary time and do the necessary serious work for accomplishing it. The establishment of this building, the collection of these books, all these facilities for steady work, are a striking public exhibition of an understanding of that very important truth."

TRIBUTE TO THE LATE LORD BIRKENHEAD

The last issue of "Graya," the magazine published twice a year for circulation among members of Gray's Inn, contains the following fine tribute from Lord Darling to the late Lord Birkenhead. It was originally published in the "Times" at the time of Lord Birkenhead's death.

GRAIAE GENTIS DECUS

Bear him to us . . . to our home—
Home he adorned, and exalted
To heights it had never attained
Since Verulam faded in shadow.

Hither he came unrenowned;
Hence went he forth to the conquest,
Armed at all points for the field,
Panoplied; wielding all weapons
Featly—no felon blow striking—
Winning his spurs in fair fight,
Winning stern foemen's affection.

Most must we mourn him, who best
Knew him, and loved him intensely.
Loved e'en his faults—he was mortal.

With brethren now leave him awhile—
Ere earth, untimely, receive him.

REVIEW OF RECENT SUPREME COURT DECISIONS

Article V of Constitution Confers on Congress Power to Determine Whether Ratification of Proposed Constitutional Amendment Shall Be by Conventions or Legislatures—Tenth Amendment Does Not Restrict Such Power—Legality of Search and Seizure Without Warrant—Validity of Succession Tax on Vested Interest of Remainderman—Road Construction Ad Valorem Tax on Railroad Real and Personal Property Upheld, Although Railroad Receives No Special Benefit—Jurisdiction to Modify Sentence in Criminal Cases, etc.

By Edgar Bronson Tolman*

Constitutional Law—Method of Ratification of Constitutional Amendments

Under Article V of the Constitution the power to determine whether a proposed amendment to the Constitution shall be by conventions or by legislatures was delegated to Congress, without any restriction on its power to determine the method of ratification. In this field, purpose has no relation to the choice of method. The Tenth Amendment imposed no restriction on the power delegated to Congress by Article V.

United States v. Sprague, Adv. Op. 289; Sup. Ct. Rep. Vol. 51, p. 220.

This opinion disposed of an appeal by the United States from an order of the district court quashing an indictment under the Prohibition Act upon the ground that the Eighteenth Amendment has not been ratified so as to become a part of the Constitution, and that there is, therefore, no constitutional authority for the statute.

The appellees argued that the Constitution by implication requires that amendments conferring on the national government new direct powers over individuals shall be ratified by conventions and not by legislatures. In support of this they urged that the framers of the Constitution thought that its ratification could be by conventions only, and that legislatures were incompetent to surrender the personal liberties of the people to the national government. Ratification by legislatures, according to their view, is limited to changes in federal machinery and other matters short of a delegation of further power to the United States. Any doubt as to the correctness of this construction they thought removed by the Tenth Amendment.

The district court quashed the indictment,

> not as a result of analysis of Article V and Amendment X, but by resorting to "political science," the "political thought" of the times, and a "scientific approach to the problem of government." These, it thought, compelled it to declare the convention method requisite for ratification of an amendment such as the Eighteenth.

The government contended that there is no ambiguity in the language of Article V and that no resort to construction is necessary. The pertinent language of that Article is that amendments shall become a part of the Constitution "when ratified by the legislatures of three-fourths of the several states or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress."

The contentions of the appellees were rejected in the Supreme Court in an opinion by Mr. Justice Roberts. Further explaining their position he said:

> They say that if the legislatures were considered incompetent to surrender the people's liberties when the ratification of the Constitution itself was involved, *a fortiori* they are incompetent now to make a further grant. Thus, however clear the phraseology of Article V, they urge we ought to insert into it a limitation on the discretion conferred on the Congress, so that it will read, "as the one or the other mode of ratification may be proposed by the Congress, as may be appropriate in view of the purpose of the proposed amendment." This cannot be done.

The clarity of the language of Article V was then emphasized:

> The Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning; where the intention is clear there is no room for construction and no excuse for interpolation or addition. . . .
>
> If the framers of the instrument had any thought that amendments differing in purpose should be ratified in different ways, nothing would have been simpler than so to phrase Article V as to exclude implication or speculation. The fact that an instrument drawn with such meticulous care and by men who so well understood how to make language fit their thought does not contain any such limiting phrase affecting the exercise of discretion by the Congress in choosing one or the other alternative mode of ratification is persuasive evidence that no qualification was intended.
>
> This Court has repeatedly and consistently declared that the choice of mode rests solely in the discretion of Congress. Dodge v. Woolsey, 18 How. 331, 348; Hawke v. Smith (No. 1), 253 U. S. 221; Dillon v. Gloss, 256 U. S. 368; National Prohibition Cases, 253 U. S. 350. Appellees urge that what was said on the subject in the first three cases cited is dictum. And they argue that, although in the last mentioned it was said the "amendment by lawful proposal and ratification has become part of the Constitution," the proposition they now present was not before the Court. While the language used in the earlier cases was not in the strict sense necessary to a decision, it is evident that Article V was carefully examined and that the court's statements with respect to the power of Congress in proposing the mode of ratification were not idly or lightly made. In the National Prohibition Cases, as shown by the briefs, the contentions now argued were made—the only difference between the presentation there and here being one of form rather than of substance.

The contention of the appellees finally considered was that based on the Tenth Amendment, which reserves to the States or to the people the powers not delegated to the United States nor prohibited to the States. Referring to this the learned Justice said:

> Appellees assert this language demonstrates that the people reserved to themselves powers over their own personal liberty, and that the legislatures are not competent to enlarge the powers of the Federal Government in that behalf. They deduce from this that the people never delegated to the Congress the unrestricted power of choosing

*Assisted by James L. Homire

the mode of ratification of a proposed amendment. But the argument is a complete non sequitur. The fifth article does not purport to delegate any governmental power to the United States, nor to withhold any from it. On the contrary, as pointed out in Hawke v. Smith (No. 1), supra, that article is a grant of authority by the people to Congress, and not to the United States. It was submitted as part of the original draft of the Constitution to the people in conventions assembled. They deliberately made the grant of power to Congress in respect to the choice of the mode of ratification of amendments. Unless and until that article be changed by amendment, Congress must function as the delegated agent of the people in the choice of the method of ratification.

The Tenth Amendment was intended to confirm the understanding of the people at the time the Constitution was adopted, that powers not granted to the United States were reserved to the States or to the people. It added nothing to the instrument as originally ratified and has no limited and special operation, as is contended, upon the people's delegation by Article V of the certain functions to the Congress.

In conclusion the Court pointed to the fact that all other amendments have been ratified in the same manner as the Eighteenth, and that, contrary to the theory advanced by the appellees, at least the Thirteenth, Fourteenth, Fifteenth, Sixteenth and Nineteenth touch rights of the individual citizen.

For these reasons we reiterate what was said in the National Prohibition Cases, supra, that the "Amendment by lawful proposal and ratification has become a part of the Constitution."

The CHIEF JUSTICE took no part in this case.

This case was argued by Solicitor General Thacher for the appellant and by Messrs. Julius Henry Cohen and Selden Bacon for appellees.

Constitutional Law—Legality of Search and Seizure Without a Warrant

The Fourth Amendment does not prohibit search and seizure without a warrant, where the officer acts upon probable cause.

Probable cause for search without a warrant existed where the officer received information from a reliable source which was substantiated by the search.

The Jones Law created no new crime in addition to those defined and enumerated in the Prohibition Act, but merely added a guide to the discretion of the courts in imposing the increased penalties provided by the later Act.

Possession was not one of the offenses for which the Jones Act increased the penalties.

Husty et al. v. United States, Adv. Op., 294; Sup. Ct. Rep. Vol. 51, p. 240.

This case came before the Court on certiorari to review conviction of the defendants in a district court on an indictment containing two counts for violations of the Prohibition Act. The first count alleged transporting, the second possession, of liquor contrary to the act. The defendants had been arrested without a warrant, and the automobile in which they were at the time of arrest was searched without a warrant.

A motion was made to suppress the use of evidence acquired in the search on the ground that the arrest, search and seizure were illegal, being made without a warrant. This motion was denied, and Husty was sentenced to five years' imprisonment and a fine of $3,000 and Laurel to imprisonment for one year and six months. The indictment alleged in the second count that Husty had been convicted twice previously for unlawful possession.

The main question considered was whether the arrest, search and seizure had been illegal. As to this the Supreme Court sustained the ruling of the district court that these acts were lawful. The opinion, delivered by MR. JUSTICE STONE, summarized the information on which the prohibition officers had acted in making the arrest and search. It appeared that one of the officers had known Husty as a "bootlegger," and had arrested him twice before, and in both cases Husty had been convicted. In the present case the officer had received information from a person, whom he knew and who had given him reliable information before, that Husty had two loads of liquor in automobiles of a certain description, at certain places. The officer believed the information and on investigation found one of the cars unattended at the place described. Later the petitioners and a third party entered the automobile, and just after they had started the car the officers stopped them. The petitioners and the third party fled and the latter escaped. A search was then made and 18 cases of whiskey were found in the car.

Holding these facts sufficient basis for probable cause to make the arrest and search, MR. JUSTICE STONE said:

The Fourth Amendment does not prohibit the search, without warrant, of an automobile, for liquor illegally transported or possessed, if the search is upon probable cause; and arrest for the transportation or possession need not precede the search. . . . We think the testimony which we have summarized is ample to establish the lawfulness of the present search. To show probable cause it is not necessary that the arresting officer should have had before him legal evidence of the suspected illegal act. . . . It is enough if the apparent facts which have come to his attention are sufficient, in the circumstances, to lead a reasonably discreet and prudent man to believe that liquor is illegally possessed in the automobile to be searched. . . .

Here the information, reasonably believed by the officer to be reliable, that Husty, known to him to have been engaged in the illegal traffic, possessed liquor in an automobile of particular description and location; the subsequent discovery of the automobile at the point indicated, in the control of Husty; and the prompt attempt of his two companions to escape when hailed by the officers, were reasonable grounds for his belief that liquor illegally possessed would be found in the car. The search was not unreasonable because, as petitioners argue, sufficient time elapsed between the receipt by the officer of the information and the search of the car to have enabled him to procure a search warrant. He could not know when Husty would come to the car or how soon it would be removed. In such circumstances we do not think the officers should be required to speculate upon the chances of successfully carrying out the search, after the delay and withdrawal from the scene of one or more officers which would have been necessary to procure a warrant. The search was, therefore, on probable cause, and not unreasonable; and the motion to suppress the evidence was rightly denied.

A further point considered was whether the indictment was defective for failure to state whether the offenses charged were felonies or misdemeanors and whether casual violations or habitual sales or attempts to commercialize violations were charged. These defects were urged in connection with the petitioners' argument that the Jones Act had created new or aggravated offenses. Rejecting this contention, the Court pointed out that the indictments were not defective on the grounds stated:

But the Jones Act created no new crime. It increased the penalties for "illegal manufacture, sale, transportation, importation or exportation," as defined by section 1, Title II of the National Prohibition Act, to a fine not exceeding $10,000, or imprisonment not exceeding five years, or both, and added as a proviso, "that it is the intent of Congress that the court, in imposing sentence hereunder, should discriminate between casual or slight violations and habitual sales of intoxicating liquor, or attempts to commercialize violations of the law." As the act added no new criminal offense to those enumerated and defined in the National Prohibition Act, it added nothing to the material allega-

tions required to be set out in indictments for those offenses. The proviso is only a guide to the discretion of the court in imposing the increased sentences for those offenses for which an increased penalty is authorized by the act.

In conclusion the Court stated its reasons for remanding the cause for reconsideration of the sentences imposed by the district court:

> The sentence imposed on each of the petitioners exceeded the maximum penalty for illegal possession under section 29 of the National Prohibition Act, which is, for a first offense, $500 fine, and for a third offense, "not less than $500" fine and not more than two years' imprisonment. As illegal possession is not one of the offenses enumerated in the Jones Act for which increased penalties are provided, and as the sentences imposed exceed any authorized by section 29 of the National Prohibition Act, the court below was in error in holding that they were supported by convictions on the second count—that for possession.
>
> Since the convictions were upheld under the first count, sentences under the Jones Act were authorized, transportation being one of the offenses enumerated in that act. But the possession alleged in the second count was not in itself necessarily an aggravation of the transportation charge which would warrant heavy sentences under the Jones Act as to either petitioner, and could not be as to Laurel, who, so far as the evidence shows, was a first offender both as to the transportation and possession. While the district court may have had before it facts other than those appearing of record which it was entitled to consider in imposing sentence under the Jones Act, we think, in view of the confusion which has arisen with respect to the propriety of the sentences under the possession count, the district court should be afforded an opportunity in its discretion to resentence the petitioners in the view of the applicable statutes, as stated.
>
> The judgment will be reversed and the cause remanded to the district court for further proceedings in conformity with this opinion.

The case was argued by Messrs. Percy F. Parrott and Harold A. Kesler for petitioners and by Mr. Amos W. W. Woodcock for respondent.

Taxation—Validity of Succession Tax

A succession tax cannot be imposed by a state upon the entry into possession and enjoyment of property by remaindermen at the termination of a trust created by deed for the life of the settlors of the trust, where the interests of the remaindermen had vested prior to the enactment of the taxing statute and their right to actual possession and enjoyment must inevitably have happened upon the passage of time subject to be divested only upon their death prior to termination of the trust, although the statute was enacted and became effective prior to their entry into actual possession and enjoyment. An attempt to impose a succession tax upon the vested interests of the remaindermen must fail upon the ground that it impairs the obligations of a contract and that it violates the due process clause of the Fourteenth Amendment.

Coolidge v. Long, Adv. Op. 308; Sup. Ct. Rep. Vol. 51, p. 306.

The question dealt with in this case came before the Supreme Court on appeals from a probate court in Massachusetts. The question raised related to the constitutional validity of a tax imposed by the statutes of Massachusetts, as applied to interests in trust property flowing from a deed of trust which was executed in July, 1907.

The trust deed conveyed real and personal property of the settlers, husband and wife, to trustees not as a bona fide purchase for full consideration, for management and investment. The trustees were empowered to determine what receipts and payments should be credited to income or principal.

The income was to be paid to the settlors during their lives in stated portions and to the survivor of them. Upon the death of the survivor the principal was to be divided equally among the five sons of the survivor, provided that if any son predeceased the survivor his share should go to those entitled to take his intestate property under the statute of distributions in force at the time of the survivor's death, with the additional provision that no widow of a deceased son should have more than half of such son's share.

No power to revoke, modify or terminate the trust was reserved. Before their death, the settlors, in 1917, assigned their interests in it to their five sons, all of whom survived the termination of the trusts. One of the settlors died in January, 1921, and the other in November, 1925.

When the trust deed was executed no statute was in effect subjecting succession to this property to tax. The first statute affecting property in the status of the trust property here was enacted in June, 1907, and became effective September 1, about five weeks after the trust deed was executed. It did not apply to property passing by deed, grant, sale or gift made prior to its effective date. But in 1912 a statute made applicable "to all property passing by deed, grant or gift . . . made or intended to take effect in possession or enjoyment after the death occurs subsequent to the passage hereof."

The following further provision became effective January 1, 1921:

> "Section 1. All property within the jurisdiction of the commonwealth . . . which shall pass by . . . deed, grant or gift, except in cases of a bona fide purchase for full consideration in money or money's worth . . . made or intended to take effect in possession or enjoyment after his death . . . to any person, absolutely or in trust . . . shall be subject to a tax. . . ."
>
> "Section 36. This chapter shall apply only to property or interests therein passing or accruing upon the death of persons dying on or after May fourth, nineteen hundred and twenty. . . ."

The Massachusetts Court construed the provisions as imposing a tax upon the taking of possession of property by the remaindermen whose interest, acquired before the death of the donor, vested in possession and enjoyment, free from a contingent gift over, on the donor's death. It upheld the exaction as an excise.

The appellants challenged this on the ground that it impaired the obligation of a contract and also on the ground that it violated the due process and equal protection clauses of the Fourteenth Amendment.

In an opinion by MR. JUSTICE BUTLER the Supreme Court upheld the contentions of the appellants on the first two of these grounds, but found it unnecessary to rule on the challenge based on the equal protection clause. Four Justices dissented.

Regarding the claim of impairment of contractual obligations MR. JUSTICE BUTLER said:

> The trust deeds are contracts within the meaning of the contract clause of the Federal Constitution. They were fully executed before the taking effect of the state law under which the excise is claimed. The Commonwealth was without authority by subsequent legislation, whether enacted under the guise of its power to tax or otherwise, to alter their effect or to impair or destroy rights which had vested under them.

The question chiefly discussed in the opinions, however, and deemed largely determinative of the case, was addressed to the nature of the interests which the sons took under the deed of trust and the effect thereon of the death of the settlors. As to this opinions were sharply divided, the majority holding

in effect that the sons' interests were vested upon the execution of the deed, and that so far as their interests were concerned the death of the settlors was merely a signal for as distinguished from the cause of their possession and enjoyment of rights previously vested.

> By the deed of each grantor one-fifth of the remainder was immediately vested in each of the sons subject to be divested only by his death before the death of the survivor of the settlors. It was a grant in praesenti to be possessed and enjoyed by the sons upon the death of such survivor. . . . The provision for the payment of income to the settlors during their lives did not operate to postpone the vesting in the sons of the right of possession or enjoyment. The settlors divested themselves of all control over the principal; they had no power to revoke or modify the trust. . . . Upon the happening of the event specified without more, the trustees were bound to hand over the property to the beneficiaries. Neither the death of Mrs. Coolidge nor of her husband was a generating source of any right in the remaindermen. . . . Nothing moved from her or him or from the estates of either when she or he died. There was no transmission then. The rights of the remaindermen, including possession and enjoyment upon the termination of the trusts, were derived solely from the deeds. The situation would have been precisely the same if the possibility of divestment had been made to cease upon the death of a third person instead of upon the death of the survivor of the settlors. The succession, when the time came, did not depend upon any permission or grant of the Commonwealth. While the sons if occasion should arise might by appropriate suit require the trustees to account, it is to be borne in mind that the property was never in the custody of the law or of any court. Resort might be had to the law to enforce the rights that had vested. But the Commonwealth was powerless to condition possession or enjoyment of what had been conveyed to them by the deeds. . .
>
> The fact that each son was liable to be divested of the remainder by his own death before that of the survivor of the grantors does not render the succession incomplete. The vesting of actual possession and enjoyment depended upon an event which must inevitably happen by the efflux of time, and nothing but his failure to survive the settlors could prevent it. . . . Succession is effected as completely by a transfer of a life estate to one and remainder over to another as by a transfer in fee.

The remaining portion of the opinion was devoted principally to an analysis of decided cases. It must suffice here to quote the conclusions reached:

> No Act of Congress has been held by this Court to impose a tax upon possession and enjoyment, the right to which had fully vested prior to the enactment. . .
>
> This court has not sustained any state law imposing an excise upon mere entry into possession and enjoyment of property, where the right to such possession and enjoyment upon the happening of a specified event had fully vested before the enactment. . .
>
> We conclude that the succession was complete when the trust deeds of Mr. and Mrs. Coolidge took effect and that the enforcement of the statute imposing the excise in question would be repugnant to the contract clause of the Constitution, and the due process clause of the Fourteenth Amendment. We need not consider whether it would also conflict with the equal protection clause. . .

The dissenting opinion was delivered by MR. JUSTICE ROBERTS with whom MR. JUSTICE HOLMES, MR. JUSTICE BRANDEIS and MR. JUSTICE STONE concurred. In this opinion attention was first called to the construction placed upon the statute by the state court upholding the tax as applied and, by way of contrast, the substance of the Supreme Court's condemnation of it.

> The Supreme Judicial Court of Massachusetts has construed and applied the statute as one taxing the taking of possession of property by a remainderman whose interest, acquired before the death of the donor, vested in possession apd enjoyment, and free of a contingent gift over, on the donor's death. . .
>
> The application of the statute, thus defined, is held by this Court to be a denial of due process, and an impairment of the obligation of a contract, on the sole ground that the remainder vested before the adoption of the taxing statute, although the enjoyment in possession of the property, and the termination of the possibility of the contingent gift over, both followed its enactment.

The effect of the majority opinion was then summarized in the following language:

> This is to deny to the Commonwealth the power to distinguish in laying its tax, between the vesting of a defeasible future interest which carries to the beneficiary no assurance of future possession or enjoyment, and the later vesting of that interest by death in possession and enjoyment of the tangible property, without possibility of being divested. It is to assert that the succession is so complete upon the mere creation of the future interest that the state must tax the future estate when that interest comes into being, or thereafter abstain entirely from taxing it.
>
> This position seems to me untenable. It is founded on the premise that the only privilege enjoyed by the holder of a future interest in property is the dry legal abstraction of owning that particular interest—that if it vested years ago, to tax the owner later on the occasion of his coming into actual possession, control and enjoyment of the property is in fact to tax him presently for the exercise of a privilege long since enjoyed.

MR. JUSTICE ROBERTS then proceeded to an elaboration of his views in support of the tax and to an analysis of numerous decisions bearing on the problem involved. In discussion of the question a suggestion as to nomenclature was made at the outset, in the interest of clarity, that the term "transfer tax" be limited to a tax on the right or privilege of transferring property after death, and the term "succession tax" be confined to the right or privilege of receiving property so transferred. In the development of the view of the dissenting Justices emphasis was placed on the effect which the death of the surviving settlor had upon the rights of the sons, since the tax, as construed was upon their right of succession to the property—particularly the effect on their right to possession and enjoyment, which rights, according to the view advanced, were materially affected by the death of the settlor:

> Though the settlor's children took a vested interest by the delivery of the deed of trust in 1907, it was subject to be divested, as to any child, by his death prior to that of the survivor of the settlors. Until the parents died it could not be known whether a child ever would possess or enjoy the trust property. Until then he had none of the rights of an owner in fee. He could not obtain possession; that was in the trustees. He could neither spend the income nor direct its expenditure; the provisions of the deed of trust governed these matters.
>
> In 1917 the parents conveyed their life estates to the children. The latter, conceiving that this entitled them, as sole owners, to the possession and enjoyment of the property, demanded of the trustees delivery of the corpus. This was refused. The settlors then filed a bill to reform the trust instrument so that it should provide that by surrender of the parents' life interests to the children the trust should terminate. They alleged that it was the true intent of the parties that the contingent remainders in the next of kin of the children should not vest if the interest of the settlors was released previous to the death of the survivor, and that appropriate language to express this intent had by mistake been omitted from the deed. The court held that no case had been made for the reformation of the deed, and refused relief. The trust property remained in the control and under the administration of the trustees. Coolidge v. Loring, 235 Mass. 220.
>
> The appellants, nevertheless, assert that while the children may have required the State's aid at the time of the delivery of the deed of trust, they never again had occasion to rely on the State's assistance; that the transfer to and into the beneficiaries was then complete; that they needed to do nothing more to become possessed of and enjoy their property; that merely to sit still and await the deaths of their parents did not constitute the doing of anything; that

the vesting of their remainder interests in 1907 covers and includes its consequence, namely, their acquirement of tangible property and the enjoyment thereof at their parents' death. In short, appellants insist that the beneficiaries did not have to look to the laws of Massachusetts for the right of possession or enjoyment; and that consequently an alleged taxing of the succession on the occasion of their acquiring such possession and enjoyment is but a thinly veiled attempt retroactively to tax the acquisition of an interest which vested in 1907.

But it is obvious that the children did rely on the law of Massachusetts for their right to receive the trust property from the trustees; and it might well have been they would have had to resort to her courts to obtain possession. All the law applicable to the administration of trusts, regulating the acts of trustees, giving remedies for trustees' defaults, providing for their compensation, and requiring the full execution of their fiduciary duties, was available to appellants. Without it their future interest, by way of remainder, might have been the merest shadow.

In the dissenting opinion, as in the majority opinion, many of the decided cases were reviewed and analyzed, but the conclusions reached as to their effect were sharply divergent from those stated in the latter opinion. The following propositions stated in the opinion must suffice to present the views of the dissenting Justices as to the effect of the authorities which they believed to support the propriety of selecting the event of the entry into possession and enjoyment of property as the occasion for imposing a succession as irrespective of the time of vesting of legal title thereto:

First. In laying succession taxes the United States has chosen as the occasion therefor not the acquirement of a mere technical legal interest in property, but the coming into actual possession and enjoyment; and this fact has been recognized by this Court. . .

Second. The sanction of this Court has been given to the collection of a like excise by the United States, under a statute similar to that here in question, and in circumstances like those in the case at bar. . .

Third. In cases involving the application of state laws imposing succession taxes, in circumstances such as are here found, this Court has overruled the contentions here made, and sustained the tax. The facts involved in some of these cases were more favorable to the appellants' contentions than those in the case at bar.

Fourth. In all its decision touching death duties, whether on successions or on transfers, this Court has enunciated principles which sustain the validity of the tax. . . .

In short it is evident from the authorities cited, and many more which might be quoted, that the power to tax property, or a right, or a status, or a privilege, acquired or enjoyed by virtue of a contract, is in no wise hindered or impeded by the fact of the existence of the contract whether it antedates or follows the effective date of the taxing act. No exercise of a governmental power, whether it be that of taxation, police, or eminent domain, though it make less valuable the fruits of a private contract, can be said to impair the obligation thereof.

The case was argued by Mr. Robert G. Dodge for appellants and by Mr. James S. Eastham for appellee.

Taxation—State Road Taxes

A tax for the construction of roads, based on all the real and personal property in the road district on an ad valorem basis, is not arbitrary and unreasonably discriminatory under the due process and equal protection clauses of the Fourteenth Amendment, although levied in respect of real and personal property of a railroad company, which receives no special benefit from the roads involved.

Memphis & Charleston Ry. Co. v. Pace, Adv. Op. 178; Sup. Ct. Rep. Vol. 51, p. 108.

The question chiefly considered in this opinion related to the validity under the the due process and equal protection clauses of the Fourteenth Amendment of a tax imposed to raise funds for roads in a district in Mississippi. The appellant, a railroad company, contended that the tax was so arbitrary and so unreasonably discriminatory as to violate both of those provisions of the Constitution. Certain other questions relating to the creation of road district were deemed to be settled by state law, and were not pressed in the Supreme Court.

The only question presented in the Supreme Court of the State which is open here is whether the act of 1920 and the confirmatory acts of 1926, as construed and applied in this case, are invalid as authorizing the imposition of a tax which is so palpably arbitrary and unreasonably discriminatory that it offends the due process and equal protection clauses of the Fourteenth Amendment.

The challenged tax was levied on the real and personal property within the district including that of the railroad company, on an ad valorem basis, without apportionment according to benefits. The railroad company attacked it for this reason, and for the reason that its property, particularly its personal property, received no benefit from the road, and for the further reason that if its property was benefitted, the tax was disproportionate to the benefit and to the tax levied on other property.

These contentions against the validity of the tax were rejected by the Supreme Court in an opinion by MR. JUSTICE VAN DEVANTER, affirming the judgment of the Supreme Court of Mississippi. In disposing of the case the Court rested its decision largely on the ground that such a tax on an ad valorem basis is not inherently invalid, even though the taxpayer receives no special benefit from the improvement.

The construction and maintenance of serviceable roads in any community is a matter in which the whole community have an interest and is a typical public purpose for which property may be taxed by the State. . . Whether the tax shall be state wide or confined to the county or local district wherein the improvement is made, and whether it shall be laid generally on all property or all real property within the taxing unit, or shall be laid only on real property specially benefited, are matters which rest in the discretion of the State, and are not controlled by either the due process or the equal protection clause of the Fourteenth Amendment. . .

But, however the tax may be laid, if it be palpably arbitrary, and therefore a plain abuse of power, it falls within the condemnation of the due process clause; . . and if it be manifestly and unreasonably discriminatory it falls within the condemnation of the equal protection clause. . .

Where the tax is laid generally on all property or all real property within the taxing unit, it does not become arbitrary or discriminatory merely because it is spread over such property on an ad valorem basis; nor where the tax is thus general and ad valorem does its validity depend upon the receipt of some special benefit as distinguished from the general benefit to the community.

An examination of the testimony adduced for and against the proposition that the appellant would receive appreciable benefit from the roads in question was thought to establish the affirmative of that proposition. But the decision was based on the broader ground that no special benefit was required to sustain the tax:

Upon applying the settled rules before stated to the case presented, we are of opinion that the appellant has not shown that the tax imposed under the sanction of the state statutes is either palpably arbitrary or unreasonably discriminatory. It was imposed for what obviously is a public purpose. It was a general tax and admissibly was spread over all the taxable property in the district according to the value thereof as fixed by the assessment for state and county taxes. The appellant was afforded ample opportunity by the state law to be heard on that assessment and to have it corrected if erroneous or unfair, and is not challenging it now. The chief complaint made here is that the imposition of the tax on an ad valorem basis was "inherently invalid" under the due process and equal protection clauses. That complaint is not tenable, as is shown in several cases before cited. And, as the tax was general

and ad valorem, its validity, as was held in St. Louis & Southwestern Ry. Co. v. Nattin, "does not depend upon the receipt of any *special* benefit by the taxpayer."

The case was argued by Mr. John B. Hyde for the appellant and by Mr. W. W. Magruder and Mr. B. H. Charles for appellees.

Federal Courts—Jurisdiction to Modify Sentence in Criminal Cases

After sentence has been imposed on a defendant in a criminal case and part of the sentence has been served, the district courts have power during the term in which it was imposed, to reduce, but not to increase, the sentence, although they have no jurisdiction to place the defendant on probation under such circumstances, under the Probation Act.

United States v. Benz, Adv. Op. 192; Supt. Ct. Rep. Vol. 51, p. 113.

The jurisdiction of the district courts to modify a sentence imposed in a criminal case was considered in this opinion. The case came before the Supreme Court on a certificate from a Circuit Court of Appeals presenting the following question:

> "After a District Court of the United States has imposed a sentence of imprisonment upon a defendant in a criminal case, and after he has served a part of the sentence, has that court, during the term in which it was imposed, power to amend the sentence by shortening the term of imprisonment?"

The government, opposing the shortening of the term of imprisonment, contended that the district court was without power to alter the sentence, even at the same term, after the defendant had been committed and had commenced service of a valid sentence. It also suggested that a reduction of the sentence is an invasion of the executive power of pardoning offenses, including power to commute a sentence.

But these contentions were rejected by the Supreme Court in an opinion delivered by MR. JUSTICE SUTHERLAND stating the Court's reasons for answering the question in the affirmative. He first pointed out that in criminal cases, just as in civil cases, judgments may be modified by the court within the term, provided the punishment is not increased. The limitation on the court's power to increase punishment under such circumstances was then declared to rest, not upon the ground that it has lost jurisdiction over the judgment, but upon the restrictions imposed by the Fifth Amendment.

> The distinction that the court during the same term may amend a sentence so as to mitigate the punishment, but not so as to increase it, is not based upon the ground that the court has lost control of the judgment in the latter case, but upon the ground that to increase the penalty is to subject the defendant to double punishment for the same offense in violation of the Fifth Amendment to the Constitution, which provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb."

In this connection Ex parte Lange 18 Wall. 163 and Basset v. United States, 9 Wall. 38 were then cited and examined to illustrate the application of the rule that criminal sentences may be reduced after judgment during the term, but may not be increased. A misunderstanding of the effect of the Lange case, arising from reference to it in *United States v. Murray*, 275 U. S. 347, was then corrected:

> The *Lange* case and the *Basset* case, *supra*, probably would have set at rest the question here presented had it not been for a statement in United States v. Murray, 275 U. S. 347, 358. In that case this Court held that where the defendant had begun to serve his sentence, the district court was without power, under the Probation Act of March 4, 1925, to grant him probation; and, citing Ex parte Lange, as authority, said: "The beginning of the service of the sentence in a criminal case ends the power of the court even in the same term to change it." But the *Murray* case involved the construction of the Probation Act, not the general powers of the court over its judgments. The words quoted were used by way of illustration bearing upon the congressional intent, but were not necessary to the conclusion reached. That they state the rule more broadly than the *Lange* case warrants is apparent from the foregoing review of that case.

In conclusion the distinction between judicial and executive power over sentences was explained in rejecting the suggestion that modification of the sentence here was an invasion of the pardoning power.

> The judicial power and the executive power over sentences are readily distinguishable. To render judgment is a judicial function. To carry the judgment into effect is an executive function. To cut short a sentence by an act of clemency is an exercise of executive power which abridges the *enforcement* of the judgment, but does not alter it *qua* judgment. To reduce a sentence by amendment alters the terms of the judgment itself and is a judicial act as much as the imposition of the sentence in the first instance.

The case was argued by Solicitor General Thacher for the United States and by Mr. Francis Biddle for the appellee.

Court of Claims—Jurisdiction Over Suits by Alien Friend

A corporation organized under the laws of Russia is an alien friend, and is entitled to maintain a suit against the United States in the Court of Claims to recover compensation for the requisition of its contracts by the United States under the Act of June 15, 1917.

Whether the provisions of section 155 of the Judicial Code, permitting certain aliens to sue the United States, are or are not limited in other classes of cases to aliens who are citizens of countries whose governments are recognized by the United States, such provisions will not be construed by implication to bar suit for compensation for the taking of private property of a friendly alien, who is entitled to the protection of the Fifth Amendment.

Russian Volunteer Fleet v. United States, Adv. Op. 403; Sup. Ct. Rep. Vol. 51, p. 229.

The suit disposed of in this opinion was instituted in the Court of Claims by the petitioner, a corporation organized under the laws of Russia, to recover from the United States compensation for the requisition of contracts for the construction of shipping vessels. The allegation was made that citizens of the United States are, and since the time of commencement of the suit, have been accorded the right to prosecute claims against the Russian Government in the Court of that Government.

The Court of Claims dismissed the petition for want of jurisdiction, notwithstanding the provisions of section 155 of the Judicial Code that:

> "Sec. 155. Aliens who are citizens or subjects of any government which accords to citizens of the United States the right to prosecute claims against such government in its courts, shall have the privilege of prosecuting claims against the United States in the Court of Claims, whereof such court, by reason of their subject matter and character, might take jurisdiction."

The ground for dismissal was that the reference in the Code to citizens or subjects of "any government" means governments recognized by the proper authorities of the United States.

On certiorari the government, though not admitting error in the ground upon which the Court of

Claims rested its decision, urged that the provisions of section 155 do not apply to claims for compensation for rights taken, as here, under an Act of June 15, 1917. But the Supreme Court in an opinion by the CHIEF JUSTICE rejected the soundness of this contention as well as the conclusion reached by the Court of Claims, without, however expressing any opinion as to the soundness of that Court's construction of section 155 as applied to other classes of cases.

As to the construction placed upon the provisions of section 155 by the Court of Claims, the Supreme Court pointed out that, at least under the allegations, the petitioner was an alien friend, duly organized under the laws of Russia, which accords the right of suit against itself to citizens of the United States.

> As the facts alleged in the petition were admitted by the motion to dismiss, the allegation that the petitioner is a corporation duly organized under the laws of Russia stands unchallenged on the record. There was no legislation which prevented it from acquiring and holding the property in question. The petitioner was an alien friend, and as such was entitled to the protection of the Fifth Amendment of the Federal Constitution. . . Exerting by its authorized agent the power of eminent domain in taking the petitioner's property, the United States became bound to pay just compensation. . . And this obligation was to pay to the petitioner the equivalent of the full value of the property contemporaneously with the taking.

From this aspect of the case the Court proceeded to a consideration of the Act of June 15, 1917. In construing that act the Court pointed out that Congress had recognized its constitutional obligation of giving compensation for the taking of property, and that the petitioner came within the terms of that act. Since that act expressly allowing compensation contained no reference to section 155 the latter would constitute no bar to the petitioner's claim unless, assuming the correctness of the Court of Claims construction of it, it be held applicable here as a bar by implication. No ground was found, however, for such an implication; but on the contrary strong reasons weighed against it, since such an implication would raise grave doubts as to the constitutionality of the Act of 1917.

> The Act of June 15, 1917, makes no reference to section 155 of the Judicial Code with respect to alien suitors, and the question is whether that provision should be implied as establishing a condition precedent and the recovery thus be defeated. It is at once apparent that such an implication would lead to anomalous results. It would mean that, although the United States had actually taken possession of the property and was enjoying the advantages of its use, and the alien owner was unquestionably entitled to compensation at the time of the taking, it was the intention of the Congress that recovery should be denied, or at least be indefinitely postponed until the Congress made some other provision for the determination of the amount payable, if it appeared that citizens of the United States were not entitled to prosecute claims against the government of the alien's country in its courts, or that the United States did not recognize the regime which was functioning in that country.
>
> We find no warrant for imputing to the Congress such an intention. "Acts of Congress are to be construed and applied in harmony with and not to thwart the purpose of the Constitution." . . The Fifth Amendment gives to each owner of property his individual right. The constitutional right of owner A to compensation when his property is taken is irrespective of what may be done somewhere else with the property of owner B. As alien friends are embraced within the terms of the Fifth Amendment, it cannot be said that their property is subject to confiscation here because the property of our citizens may be confiscated in the alien's country. The provision that private property shall not be taken for public use without just compensation establishes a standard for our Government which the Constitution does not make dependent upon the standards of other Governments. The Act of Congress should be interpreted in the light of its manifest purpose to give effect to the constitutional guaranty.
>
> Nor do we regard it as an admissible construction of the Act of June 15, 1917, to hold that the Congress intended that the right of an alien friend to recover just compensation should be defeated or postponed because of the lack of recognition by the Government of the United States or the regime in his country. *A fortiori*, as the right to compensation for which the Act provided sprang into existence at the time of the taking, there is no ground for saying that the statute was not to apply, if at a later date, and before compensation was actually made, there should be a revolution in the country of the owner and the ensuing regime should not be recognized. The question as presented here is not one of a claim advanced by or on behalf of a foreign government or regime, but is simply one of compensating an owner of property taken by the United States.
>
> The Act of June 15, 1917, if read according to its terms, presents no difficulty. A condition should not be implied which, to say the least, would raise a grave question as to the constitutional validity of the Act.

The case was argued by William L. Rawls for petitioner and by Claude R. Branch, special Assistant Attorney General, for respondent.

Statutes—The Maryland Game Law—Police Power-Classification

The Maryland Act for "The conservation of water fowl and the protection and safety of those engaged in shooting them" may validly prohibit the erection of blinds within 300 yards from the natural shore line and at least 250 yards from the dividing lines which separate adjoining shore owners. The act is not preferential and discriminatory as to the owners of property with less than 500 yards of frontage.

Wampler v. Lecompte, Adv. Op. p. 121; Sup. Ct. Rep. Vol. 51, p. 92.

Appellant Wampler, who owned land with a frontage on the Potomac of less than 44 feet, erected a duck blind in front of his property. Owing to his narrow frontage this blind obviously was within 250 yards of the line which divided his property from the adjacent water front property. The act in question gave a preferential right to the riparian owner to select a position for his blind but prohibited the erection of any blind less than 500 yards from another blind and less than 250 yards from the dividing line of adjacent water front property, unless with the consent of the adjacent land owner.

The State Game Warden destroyed the blind and threatened to destroy any other which Wampler might erect contrary to the provisions of the Act. He filed this bill to enjoin the threatened action.

Wampler admitted the right of the State to prohibit altogether the creation of blinds and to regulate their erection and maintenance but claimed that the statute violated the equality clause of the 14th Amendment because it discriminated in favor of riparian owners with a frontage of more than 500 yards. The case was heard on bill and answer, the trial court dismissed the bill, its decree was affirmed by the highest court of Maryland and the judgment of that court was affirmed by the Federal Supreme Court.

MR. JUSTICE BRANDEIS, after stating the case disposed of appellant's contention in the following words:

> No fact is shown on which to base the contention that the State's power of classification has been exercised unreasonably. The purpose of the legislation is, as the court found, "the conservation of water fowl and the protection and safety of those engaged in shooting them. The necessity for such regulation is apparent, for if blinds could be erected in broad waters at any distance from the shore,

(*Continued on Page 250*)

Washington Letter

March 8th.

THE 71st Congress adjourned March 4, 1931, and all proposed legislation which failed of enactment expired automatically with the Congress and can only be revived by being introduced in the form of new bills during the 72nd Congress. Numerous bills, mostly of minor importance, were passed within the last few days of the Session, making it almost impossible for the President to consider and sign all of them prior to the adjournment of Congress. Attorney General William D. Mitchell gave an opinion that the President was not required to sign bills before the adjournment of Congress to make them laws, but had the usual ten-day period after the passage of a bill and its receipt by him in which to act on it. One of the bills vetoed by the President within the ten-day period, was the Wagner bill providing for a new system of employment agencies.

Bills to Make the United States a Party Defendant in Certain Cases

This bill, H. R. 980, was sent to conference January 13, 1931. The House conferees refused to recede from their disagreement with the Senate amendment and as a result the conferees of the respective Houses agreed on a substitute, in lieu of the provisions of the House bill and the Senate amendments. The conference report was agreed to by both Houses and the bill was signed by the President March 4th, making it a law (Public No. 862). As approved, the measure reads as follows:

That, upon the conditions herein prescribed for the protection of the United States, the consent of the United States be, and it is hereby given, to be named a party in any suit which is now pending or which may hereafter be brought in any United States district court, including those for the districts of Alaska, Hawaii, and Porto Rico, and the Supreme Court of the District of Columbia, and in any State court having jurisdiction of the subject matter, for the foreclosure of a mortgage or other lien upon real estate, for the purpose of securing an adjudication touching any mortgage or other lien the United States may have or claim on the premises involved.

Sec. 2. Service upon the United States shall be made by serving the process of the court with a copy of the bill of complaint upon the United States Attorney for the district or division in which the suit has been or may be brought and by sending copies of the process and bill, by registered mail, to the Attorney General of the United States at Washington, District of Columbia. The United States shall have sixty days after service as above provided, or such further time as the court may allow, within which to appear, and answer, plead or demur.

Sec. 3. Any such suit brought against the United States in any State court may be removed by the United States to the United States district court for the district in which the suit may be pending. The removal shall be effected in the manner prescribed by section 29 of the Judicial Code (title 28, sec. 72, U. S. C.), provided that the petition for removal may be filed at any time before the expiration of thirty days after the time herein or by the court allowed to the United States to answer and no removal bond shall be required. The court to which the cause is removed may, before judgment, remand it to the State court if it shall appear that there is no real dispute respecting the rights of the United States, or all the other parties shall concede of record the claims of the United States.

Sec. 4. Except as herein otherwise provided, a judicial sale made in pursuance of a judgment in such a suit shall have the same effect respecting the discharge of the property from liens and encumbrances held by the United States as may be provided with respect to such matters by the law of the State, Territory, or District in which the land is situated, provided that a sale to satisfy a lien inferior to one of the United States shall be made subject to and without disturbing the lien of the United States, unless the United States, by its attorneys, consents that the property may be sold free of its mortgage or lien and the proceeds divided as the parties may be entitled, and provided further than where a sale is made to satisfy a lien prior to that of the United States, the United States shall have one year from the date of sale within which to redeem. In any case where the debt owing the United States is due, the United States may ask, by way of affirmative relief, for the foreclosure of its own lien or mortgage and in any case where property is sold to satisfy a first mortgage or first lien held by the United States, the United States may bid at the sale such sum not exceeding the amount of its claim with expenses of sale, as may be directed by the chief of the department, bureau or other agency of the Government which has charge of the administration of the laws in respect of which the claim of the United States arises.

Sec. 5. If any person shall have a lien upon any real or personal property, duly filed of record in the jurisdiction in which the property is located, and a junior lien (other than a lien for any tax) in favor of the United States attaches to such property, such person may make a written request to the officer of the United States charged with the administration of the laws in respect of which the lien of the United States arises, to have the same extinguished. If after appropriate investigation, it appears to such officer that the proceeds from the sale of the property would be insufficient to satisfy, in whole or in part, the lien of the United States, or that the claim of the United States has been satisfied, or by lapse of time or otherwise has become unenforceable, such officer shall so report to the Comptroller General who thereupon may issue a certificate of release, which shall operate to release the property from such lien.

Sec. 6. No judgment for costs or other money judgment shall be rendered against the United States in any suit or proceeding which may be instituted under the provisions of this act. Nor shall the United States be or become liable for the payment of the costs of any such suit or proceeding or any part thereof.

The House of Representatives, by H. Con. Res. 52, proposed to add a section to the measure as follows: "Sec. 7. This act shall not apply to any lien of the United States held by it or for its benefit under the Federal reclamation laws."

The resolution was passed by the House of Representatives February 27th, but was not acted upon by the Senate.

Bill Amending the Leasing Act

On March 4th, the President approved S. 6128, to amend Sections 17 and 27 of the Oil and Gas Leasing Bill (41 Stat. 437). This measure affects the public domain of the United States and allows unit operation and cooperative development of oil and gas thereon with the approval of the Secretary of the Interior. Under its provisions, the Secretary of the Interior is authorized at all times to either extend or restrict the amount of oil or gas produced so as to prevent an excessive supply from flooding the market. This measure further authorizes the approval by the Secretary of the Interior, of operating, drilling and development contracts by permittees or lessees, regardless of acreage limitations whenever the policy of conservation or the public necessity or convenience will be promoted. This provision is intended to permit pipe line companies to enter into contracts with permittees or lessees in numbers sufficient to justify the construction of such pipe lines and to finance the same. The law is Public No. 853.

Term of President and Vice-President and Members of Congress

The legislation proposing an amendment to the Constitution fixing the commencement of the term of the President, Vice-President and Members of Congress (S. J. Res. 3) failed of enactment because the Senate and House conferees were unable to agree on a conference report.

The original Senate resolution fixed the day for the beginning of the term of the House and Senate members as of the 2nd day of January and the same date for the assembling of Congress. The House changed the date to January 4th. The Senate fixed the beginning of the term of the President as of January 15th, while the House changed the date to January 24th.

The House fixed the date of final adjournment of the session of Congress on the 4th of May. Without the House amendment, according to the statement made by Speaker Longworth, it would be possible that Congress could be kept in continuous session from the time it met, after the provisions of the resolution became effective. The bill in effect would abolish the short session of Congress.

Proposed Legislation Which Failed of Enactment

The following measures proposed during the 71st Congress, failed of enactment:

S. 96, To further administration of justice in Federal courts, making decision of highest courts of the State binding upon Federal courts as to the common law of such State.

S. 374, To amend practice and procedure in Federal courts, re comment on credibility of witnesses and charge to the jury.

S. 541, To limit time for beginning suit on bonds of clerks of United States district courts.

S. 1645, To amend Sec. 876, Rev. Stat., re service on witnesses outside of district.

S. 1916, To amend Sec. 1025 Rev. Stat., by providing that no indictment shall be insufficient because of presence of clerks or stenographers.

S. 2110, Exempting newspaper men from testifying with respect to the sources of certain confidential information.

S. 2497, To amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes. (Shipstead Bill.)

S. 4357, To limit jurisdiction of district courts of the United States. (Norris Bill.)

H. R. 23, To amend the Judicial Code by adding a new section, to be numbered 274-D (to authorize the issuance of "Declaratory Judgments.")

H. R. 699, To prevent fraud, deception, or improper practice in connection with business before the United States Patent Office, and for other purposes.

H. R. 5413, Providing a trial by jury for acts constituting contempt of court.

H. R. 9937, To provide for summary prosecution of slight or casual violations of the national prohibition act.

H. R. 11199, To amend Sects. 22 and 39, Title II, of the national prohibition act, relating to padlock proceedings against absent or unknown property owners through the publication of notices of such proceedings.

H. R. 11935, Exempting building and loan associations from being adjudged involuntary bankrupts.

H. R. 12056, Providing for the waiver of trial by jury in the district courts of the United States.

H. R. 14055, To make permanent certain temporary judgeships.

H. R. 5702, To amend the first paragraph of Sec. 41 of the Code of Laws of the United States of America. (To increase jurisdictional amount from $3,000 to $10,000.)

S. J. Res. 162, Requiring unanimous decision of Supreme Court in order to declare an act of Congress unconstitutional.

S. J. Res. 264, Extending the duration of copyright protection in certain cases.

Review of Recent Supreme Court Decisions

(*Continued from Page 248*)

without regard to the distance separating them, it would not only be conducive to the destruction and annihilation of ducks and other water fowl, but extremely dangerous to those shooting them." 150 Atl. 457. The provision which prohibits placing a blind within 250 yards of the land of an adjoining owner without securing his consent, is a necessary incident of the preferential right conferred upon riparian owners. See *Sheehy v. Thomas*, 155 Md. 688. There was obviously no intention to discriminate in favor of persons having a large water frontage; for the consent provision enables owners of small frontages to join in erecting blinds spaced the requisite distance apart.

Nor is the equality clause violated by the special provisions that in certain inland waters blinds need not be placed farther apart than 250 yards. The state court, relying upon *Lindsley v. Natural Carbonic Gas Co.*, 220 U. S. 61, 78, said: "Why these provisions were inserted in the statute we are not informed, but we may assume, until the contrary is shown, that a state of facts in respect thereto, existed, which warranted the legislature in so legislating." 150 Atl. 458. This long-settled rule disposes also of the alleged discrimination created by the special exemptions applicable to certain other waters of the State.

The case was argued by Mr. T. Morris Wampler for the appellant.

NOTABLE TRIBUTE TO JUSTICE HOLMES ON HIS NINETIETH BIRTHDAY

THE ninetieth birthday of Mr. Justice Holmes was made the occasion of a remarkable tribute from the Bench, Bar and Law Schools of the country. The ceremonies, which were under the auspices of the Yale Law Journal and the Columbia Law Review, were broadcast over the Columbia network Sunday morning. Dean Charles E. Clark, of the Yale Law School, from the studios of the broadcasting system in New York, introduced Chief Justice Hughes, who spoke from Washington. Dean Clark then introduced Hon. Charles A. Boston, President of the American Bar Association, who spoke from the New York studio. Mr. Justice Holmes briefly responded from his home in Washington, in which special arrangements had been made for transmitting his remarks. The address of Chief Justice Hughes and the Justice's reply, as printed in the New York Times, follow:

Keystone View Co.

JUSTICE OLIVER WENDELL HOLMES

Address of Chief Justice

The Nation salutes Mr. Justice Holmes on this happy and unique anniversary. If we make our estimates in terms of the spirit, its power, its alertness, its sensitiveness to impression, its keenness of interest in the shifting scenes of human experience, Mr. Justice Holmes is not old, but invincibly young. It is difficult for one who is in daily and intimate association with him to think of great age, as he is a constant contradiction of all that great age usually implies. He has abundantly the zest of life and his age crowns that eagerness and unflagging interest with the authority of experience and wisdom. In his important work, he is indefatigable. No one could be more scrupulous in meeting every obligation; no one more intense in devotion to his task. Every case that is presented to the Court arouses in him such immediate and earnest response that it is almost impossible to realize that in his service in the Supreme Court of the United States and in the Supreme Judicial Court of Massachusetts he has been listening to argument for almost fifty years. He has the dauntlessness and unquenchable fire of youth,—ever ready, ever undismayed. His wit is as quick as ever, and his mental thrust as skilful and as vigorous. Above all, he is as lovable as ever,—with the warm heart that resists the chill of years. While conserving his strength in a prudent and dignified withdrawal from the trivialities of conventional social intercourse, he is today, as ever, the best company in Washington; and I think that one could search the world in vain for any personality more electric and inspiring in its contacts.

This anniversary brings to our minds with startling emphasis the youthfulness of our country, its splendid, adventurous, exciting youth. On March 8, 1841, when Oliver Wendell Holmes, junior was born, a new President, William Henry Harrison, had just been inaugurated after the twelve years of the Jackson-Van Buren era. Only a few days before, the great case of Groves v. Slaughter had been heard in the Supreme Court, with the arguments of Henry Clay and Daniel Webster, in relation to State and Federal power over the introduction of slaves within State borders.

Daniel Webster was about to assume the office of Secretary of State. When the infant Holmes opened his eyes in that fortunate New England home, and met the proud and loving gaze of the father,—the senior Oliver Wendell Holmes, who enriched the literature of his country with the rare charm of the poet and essayist, and was destined through his son to confer an even greater distinction upon our jurisprudence,—the people of the United States numbered about seventeen millions as against about one hundred and twenty-three millions now. The movement to the Oregon country over the Oregon trail had not yet begun. The rush to California, due to the discovery of gold, was still several years distant, and the great resources of natural wealth in Colorado, Nevada and the far Northwest were yet unknown. The Mexican War was still to be fought. Within this period of ninety years, what restless adventure, what terrible peril, and what vast achievements! culminating in a world,—in the truest sense a new world—a transformation too near to us to be adequately appreciated,—with facilities hitherto undreamed of, with novel intimacies and astounding revelations of the ways of nature.

The most beautiful and the rarest thing in the world is a complete human life, unmarred, unified by intelligent purpose and uninterrupted accomplishment, blessed by great talent employed in the worthiest activities, with a deserved fame never dimmed and always growing. Such a rarely beautiful life is that of Mr. Justice Holmes.

I could not give you, if I would, even an epitome of such a career. But many of you who are listening to me may be glad of the mention of some of its outstanding points, so that in part, at least, you may visualize the life of the man you honor. How could he have been better born or more richly endowed by parentage and environment? Best of all, perhaps, was the imperative urge to make these advantages count. But as he came to manhood, outward circumstance was not propitious. The clouds of civil strife lowered over his future path, and when he was graduated from Harvard in 1861 we were in the midst of war. His first public act was to give himself to the defense of his country. I think that he has always had the martial spirit. His bearing suggests it,—his self-discipline and regard for order in all the arrangements of his life attest it. His judicial opinions are as valiant as they are astute. In the war, he was a shining mark,—thrice wounded,—shot through the breast at Ball's Bluff and through the neck at Antietam. The country narrowly escaped irreparable loss. After being wounded at Antietam, he was for a time lost to his friends, and his father's story, "My Hunt After the Captain" (Captain Holmes), is one of the nation's literary treasures.

Retiring from the army, young Holmes studied law and came to the Bar in 1867. Then followed years of intense study, not the ordinary legal studies but the extraordinary pursuits of a mind of the highest order bent upon piercing to the very roots of our law and laying bare the fascinating processes of its growth. That period of study and of teaching law culminated in his famous Lowell lectures of 1880, published in 1881, when he was at the age of forty,—"The Common Law," which stands as an unsurpassed contribution to the understanding of our legal concepts. Practice supported study and both gave high reputation. All was preparation for the career to which aptitude and inclination led. In December, 1882, forty-eight years ago, he was appointed Associate Justice of the Supreme Judicial Court of Massachusetts. A little less than seventeen years later, he was made Chief Justice of that Court. And then, in December, 1902, he became Associate Justice of the Supreme Court of the United States. With many judges that would be the end of the recital, or, at least, of public interest in it, but, with Mr. Justice Holmes, our special interest begins with his judicial career. For this Judge, without doffing the judicial robe, has made himself not only an expounder and artificer of the law but a leader of opinion, with an influence transcending the limits usually assigned to judicial utterances.

What is his secret? An arresting style, which gives point and finish to decision; a pungent wit, which is above the law; the broad vision of a philosopher; a sense of reality; an instinct for leadership; a capacity for making the old serve the new, both being clay in the hands of the expert potter. Mr. Justice Holmes—old! He is the exemplar and prophet of the young,—the apostle of the latest generation, the master equally of black-letter learning and the most recent thought, with the keen eye to discern folly whether of the ancient or of the modern. More modern than the modernist, for he knows what is not modern; truer to the old than many a conservative, for he is more likely to know how the old became such, and what in it is worth conserving.

We have had great judges, but Mr. Justice Holmes cannot be confined to any such category. Let him tell his own story in the revealing words of an address made by him over thirty years ago:

"My way has been by the ocean of the law. On that I have learned a part of the great lesson, the lesson not of law but of life. There were few of the charts and lights for which one longed when I began. One found oneself plunged in a thick fog of details—in a black and frozen night, in which were no flowers, no spring, no easy joys. Voices of authority warned that in the crush of that ice any craft might sink. One heard Burke saying that law sharpens the mind by narrowing it. One heard in Thackeray of a lawyer bending all the power of a great mind to a mean profession. One saw that artists and poets shrank from it as from an alien world. One doubted oneself how it could be worthy of the interest of an intelligent mind. And yet one said to oneself, law is human—it is a part of man, and of one world with all the rest. There must be a drift, if one will go prepared and have patience, which will bring one out to daylight and a worthy end. You all have read or heard the story of Nansen and see the parallel which I used. . . . In the first stage one has companions, cold and black though it be, and if he sticks to it, he finds at last that there is a drift as was foretold. . . . But if he is a man of high ambitions he must leave even his fellow-adventurers and go forth into a deeper solitude and greater trials. He must start for the

pole. In plain words he must face the loneliness of original work. No one can cut out new paths in company. He does that alone. . . . He knows now what he had divined at the outset, that one part of the universe yields the same teaching as any other if only it is mastered, that the difference between the great way of taking things and the small—between philosophy and gossip—is only the difference between realizing the part as a part of a whole and looking at it in its isolation as if it really stood apart. . . . I care not very much for the form if in some way he has learned that he cannot set himself over against the universe as a rival god, to criticize it, or to shake his fist at the skies, but that his meaning is its meaning, his only worth is as a part of it, as a humble instrument of the universal power. It seems to me that this is the key to intellectual salvation, as the key to happiness is to accept a like faith in one's heart, and to be not merely a necessary but a willing instrument in working out the inscrutable end."

That, I think, may be taken to be the confession of faith of Mr. Justice Holmes.

How many of our judges have been not only revered but beloved? We bring to Mr. Justice Holmes our tribute of admiration and gratitude. We place upon his brow the laurel crown of the highest distinction. But this will not suffice us or him. We honor him, but, what is more, we love him. We give him to-night the homage of our hearts.

Justice Holmes' Reply

In this symposium my part is only to sit in silence; to express one's feelings as the end draws near is too intimate a task. But I may mention one thought which comes to me as a listener in. The riders in a race do not stop short when they reach the goal.

There is a little finishing canter before coming to a standstill; there is time to hear the kind voices of friends and to say to one's self "The work is done." But just as one says that the answer comes:

"The race is over but the work never is done while the power to work remains."

The canter that brings it to a standstill need not be only coming to rest; it cannot be while you still live, for to live is to function. That is all there is in living. And so, I end with a line from a Latin poet who uttered the message more than 1,500 years ago:

Death clutches my ear and says, "Live, I am coming."

Articles Published in "Commerce Reports," Issued by the Bureau of Foreign and Domestic Commerce, of the Department of Commerce, Up to February 22, Including Those for January 19 and 26

The acceptance of a bill of exchange under the Portuguese codes constitutes a novation or new contract, extinguishing completely the previous contract in settlement of which the bill was given. Therefore, on the dishonor of the bill, the original debt is not revived, and any judicial action must be based upon the bill alone. To avoid lengthy proceedings in cases involving small sums, which form the majority of commercial difficulties, a special Portuguese decree was published on May 29, 1907, providing for the summary trial and settlement of civil and commercial actions whose value does not exceed 10,000 escudos ($450) in Lisbon and Porto, and 5,000 escudos in the remainder of the nation. A discussion of this phase of the Portugese law is found on page 179 of C. R. for Jan. 19, 1931.

According to an article appearing on page 320 of C. R. for February 2, 1931, an emergency decree applying the German Government's "finance reform" program was issued by the Reichspresident on December 1, 1930, embodying 27 different measures, which effects many changes in German public finance, agriculture, banking, and housing policy—aiding German business and agriculture to overcome the severe economic depression now prevailing.

Foreign corporations which establish branches or agencies in El Salvador, must file in the registry of commerce their charters of organization, by-laws, and the inscription of these documents which is made in the court of commerce at the principal place of business of the company in El Salvador. The appointment of managers and agents thereof must be similarly filed; otherwise, the corporations are denied recourse to the courts of the country. This is outlined on page 395 of C. R. for February 9, 1931.

Following is a complete list of material published: Commerce Reports, Jan. 19: Summary Process for Small Civil and Commercial Actions in Portugal; Trade-Mark Applications in Argentina; Proposed Reduction of Tax on the Movement of Capital by German Government; Infringements of American Trade-Marks in Java and Elsewhere. Jan. 26: Canadian Decision Concerns Tort Liability of Trade-Unions; Unregistered Foreign Corporations May Sue in Guatemala; London Test Case Involves Automatic Machines; Trade Mark Applications in Argentina; Syria Enacts Its First Child Labor Law. Feb. 2: Colombian Action against Acceptor Based on Unprotested Draft Held Permissible; Trade-Mark Applications in Argentina; Manual Labor for Road Building Made Compulsory in Hungary; Germany Institutes "Finance Reform." Feb. 9: Italian Legal Decision Regarding Crossed Checks; Publication of Notices of Registration of Trade-Marks in Peru; Amendment to Portuguese Legislation Relative to Protest of Drafts; Summary Court Action for Recovery in Portugal; Doing Business by Foreign Corporation in El Salvador; Argentine Decision Concerns Machinery Sales and "Prenda Agraria"; Protection of Patents, Trade-Marks, and Copyrights in Ethiopia; New Procedure in Bankruptcy Cases in Siam. Feb. 16: Consignment Laws of Latvia; Passing of Title in Porto Rico; Guatemalan Decree Exempts from Fine for Unpaid Taxes; Insurance in Tientsin, China, Continues Steady; Taxation of Insurance Premiums in Colombia.

Special Circulars: No. 250, "French Insurance Law and Practice"; No. 251, "Taxation and Company Law in Norway"; No. 252, "Regulations of the Venezuelan Law of Factory, Trade and Agricultural Marks"; No. 253, "Protection of Industrial Property Modifying the International Industrial Property Convention of March 20, 1883, revised at Brussels December 14, 1900, and at Washington June 2, 1911. Signed at The Hague, 1925, Effective June 1, 1928"; No. 254, "Ratification of the U. S. Senate of the General Inter-American Convention for Trade Mark and Commercial Protection, signed at Washington Feb. 20, 1929"; No. 255, "International Treaty Modifying Existing Treaty for Protection of Patents"; No. 247-A, Correction to No. 247, "Principles of the Cuban Law of Civil Contracts"; No. 256, "Supplemental Index to Publications of the Division of Commercial Laws"; No. 257, "Tax Modifications in Great Britain."

Signed Articles

As one object of the AMERICAN BAR ASSOCIATION JOURNAL is to afford a forum for the free expression of members of the bar on matters of importance, and as the widest range of opinion is necessary in order that different aspects of such matters may be presented, the editors of this JOURNAL assume no responsibility for the opinions in signed articles, except to the extent of expressing the view, by the fact of publication, that the subject treated is one which merits attention.

OUR ANTI-TRUST LAWS AND THE ECONOMIC SITUATION

Fundamental Purpose of Our Anti-Trust Laws—Current Economic Conditions—The Merger Movement—Mergers and Overproduction—Proposed Amendment in Relation to Mergers—The Trade Association as an Economic Factor—Overproduction and Price Fixing by Group — Curtailment of Production and the Law—Proposed Amendment, etc.*

By David L. Podell
Member of the New York City Bar

FOR some forty odd years, our Anti-Trust Laws have been the subject of discussion, controversy, litigation and innumerable court decisions. More recently our economic status has called forth a volume of opinions and discussions from economists, bankers and merchants. Many and varied have been the views expressed. President Hoover, in his message at the opening of the present session of Congress, recommended that Congress institute an inquiry into some aspects of the economic workings of these laws.

Laymen generally have given expression to the thought that our bar might be of greater assistance in the effort to solve certain pressing legal economic problems inherent in these laws.

If the remarks that I shall have occasion to make this afternoon serve the purpose of provoking and stimulating a study of these problems among our bar, they will, perhaps, have been justified.

Fundamental Purposes of Our Anti-Trust Laws

The aim of our Anti-Trust Laws is to preserve inviolate the principle of free, fair, and open competition. In other words, everyone, under our system of law, has the right to go into any business and conduct it as he chooses, freely, according to law and according to his own best lights. Under these laws we shut out no man from any business or industry no matter how overcrowded that industry might be. We aim to keep wide open the door of opportunity to large and small business and to the individual. At the same time the laws seek to protect the consumer so that he may purchase his commodity at competitive prices in a free and open market.

These may be said to be the fundamental aims of our Anti-Trust laws as distinguished from the basic principles of cooperative or communistic programs which submerge the individual and make him an infinitestimal part of a grand scheme of business conducted by government.

We have not even favored a system of cartels generally prevalent among European countries. Those may best be described as close associations operating under government supervision where industry is rationalized and standardized and made to operate in accordance with given formulæ, in given territories, upon given price schedules and upon a basis of allotted production.

We have not seen that the cartels or any other governmental schemes can produce or have, in the long run, produced a better standard of living, or have in any sense, worked better results in industry than our own system of individual freedom of business, particularly when we have in mind the standards of living attained in this country in comparison with the standards attained in countries which pursue the other economic philosophies.

For that freedom of opportunity we have to pay a certain price, a certain toll. The tremendous advantages of a free market, of individual initiative, energy or genius, are not without their disadvantages. We find certain industries and certain businesses overcrowded. We find that that overcrowding, at times, contributes towards the overproduction of commodities. We find, at times, that price-cutting is so intense as to make production of a commodity on a profitable basis extremely difficult. Particularly in days of depression, do we feel these disadvantages keenly.

Do they have to be endured in order to preserve the great underlying principles of freedom of opportunity, freedom of competition, freedom of individual initiative in business? That is the great problem of Anti-Trust Legislation. By what method of amendment may we so far reduce the disadvantages to a minimum and preserve the benefits of those Anti-Trust Laws for the community?

Current Economic Conditions

We have been, for the past year, passing through a weeding out process in industry. Weaker enterprises, mushroom growths, institutions unsoundly financed have here and there been falling by the wayside. The retirement of these industries from the field and the effort of the sounder institutions towards retrenchment for self-preservation have created a widespread unemployment situation. Merchants, bankers, economists, men in both political and business life generally, are satisfied that with time, conditions will adjust themselves. Indeed, some have said that there are signs, here and there, of slow recovery.

Throughout this period of stress, the American public has naively turned to the process of legislation of some panacea, some cure-all, that will restore prosperity. Naturally attention has been focused

*Address delivered before the New York County Lawyers Association February 6, 1931.

on that portion of our laws which is most intimately bound up with the economic fabric of the country, our Anti-Trust Laws. Various amendments and modifications have been proposed. Some have favored relaxation of the criminal features of the law—the usual arguments have been advanced against their uncertainty—and others have argued for the complete repeal of all of the Anti-Trust Laws. It is to be expected that in an abnormal or subnormal period unusual and extraordinary measures will be proposed.

There is no doubt that the majority of our business organizations is headed by groups of law-abiding, right-thinking citizens. It is largely due to their enlightened policies in the management of big business that the public has been won over to a wholesome respect, at least a friendly tolerance, of the so-called trusts. The agitation and resentment against big business which gave birth to the Anti-Trust Laws have been largely converted into a feeling of good will and an acceptance of the essential proposition that with the march of time huge aggregations of capital and concentrations of industry are necessary to commercial progress.

The capital issues of these large combinations have been widely and popularly diffused. Big business is no longer the threatening octopus of the nineties. There can be little doubt that the restraining hand of the Anti-Trust Laws has played no small part in the development of a higher ethical standard for business, big and small. There is equally no doubt that there is and has been a minority who are and have been ready to indulge in the ruthless tactics of business piracy, and that in the main, this great law, or body of laws, has acted as a wholesome deterrent to prevent oppression of small merchants and to keep our markets open for the benefit of the multitudes of consumers.

There is one conclusion about which there is very little doubt in my own mind. A repeal of our Anti-Trust Laws would work a grievous injury to the thousands of smaller business units scattered through the country and would prove to be disastrous to many of them. Laws that have withstood the assaults of powerful business organizations for four decades must have fundamental merit. Unless we are prepared to allow a selfish minority to return to the days of the ruthless boycott, of illicit rebates, of commercial espionage, of all the tactics of oppression and coercion which gave birth to these great laws, we must not repeal them.

All of this, however, does not mean that there is not ample room for improvement in the operation of the laws and in their enforcement. It is eminently fitting that lawyers make a study of those evils or maladjustments in business which bear a direct relation to the laws, and consider such amendments as will facilitate the proper conduct of business.

The Merger Movement

These laws divide themselves naturally into two domains. First, the merger or consolidation, and secondly, what has come to be known as the trade association.

In the five years prior to 1929, this country, indeed the world, has gone through an extraordinary merger period. In 1923, in manufacturing and mining alone, the estimated number of concerns participating in mergers or amalgamations was 378. In 1928, the number totalled 1,259, an increase of nearly 400%.[1] Figures for mergers in all lines of industry, trade and commerce for the same period are not available, except through the compilation of merger reports in newspapers. But the accelerating trend toward consolidation was quite evident in motion pictures, department stores, chain stores and wholesale distributing units of branded products, the so-called circular merger. Banking institutions kept pace with the general tendency toward concentration. During this period over five thousand banks disappeared, largely as a result of mergers. The Federal Reserve Board remarks:

> "During these years progressive integration of banking control has in its larger aspects clearly reflected—although it has followed rather than preceded—a similar integration of control which has been in process through industry generally. Consolidation has gone less far in the field of banking than in many lines of manufacturing, marketing and public utility operations."

One per cent of the banks reported one-half of the banking resources of the nation.[2]

The degree to which our Anti-Trust Laws directly affected the merger process is of peculiar interest. When in 1904 the Supreme Court of the land declared the Northern Securities merger, effected through the medium of a holding company, violative of law, for many years following, the merger movement, especially through the holding company device, receded. In 1920, as a result of the decision of the Steel case which declared that mere size in itself is no violation of law, the merger movement was revived and continued unabated, increasing in intensity until what might be called its collapse in the latter part of 1929.[3]

Let us pause for a moment to consider certain prominent features of this merger period. Most of them were reflected in the securities market.

Where the combination or merger is of a character involving a multiplication of similar units, best typified by a utility,—while the problems of management are always difficult, the uniformity of structure naturally lends itself to greater management facility. If the nature of the business is such as to involve change in style, in commodity, perishability of commodity, seasonal changes in commodity, it begins to present a far greater difficulty in the matter of general management policy. In short, it is not as difficult to manage a huge institution like a telephone company as it would be to manage a national wearing apparel institution, the latter having so large an element of change, of shifting of style, of shifting of commodity.

It is well known that there are some industries which, from their very nature, do not lend themselves to large scale consolidation.

In a feverish securities market such as we have just passed through, promoters are apt to overlook the normal safeguards to sound business consolidation in an effort to satisfy the public demand for new issues. We are all wiser after the event, yet

1. Report of the Committee on *Recent Economic Changes*, 1929, Volume 1, page 184.

2. *Annual Report of the Federal Reserve Board covering operations for the year 1929*, pages 29, 30.

3. *U. S.* v. *Northern Securities Company* (1904), 193 U. S. 197; *U. S.* v. *U. S. Steel Corporation* (1920), 251 U. S. 417.
See National Industrial Conference Board. *Mergers and the Law*. 1929. Prepared by Mr. Myron W. Watkins.

it would be most unfortunate if from that wisdom we did not learn the lesson that will guide us to avoid similar disasters in the future.

A peculiar anomaly exists in our Anti-Trust Laws which has also in some measure contributed to the rise in the merger movement in the past ten years. Competitors in any given line of industry, formed in a trade association, are not permitted to agree upon production schedules and uniform prices. When they consolidate, amalgamate or merge into a single unity, the laws' restriction vanishes. They may then curtail production,—they may and do fix one price.

Several years ago Mr. Justice Brandeis in his dissenting opinion in the Hardwood Lumber case, argued for a greater freedom for trade associations, and concluded his opinion with this question:

> "May not these hardwood lumber concerns, frustrated in their efforts to rationalize competition, be led to enter the inviting field of consolidation?"[4]

Mergers and Overproduction

As to the evil of overproduction, it is noteworthy that there is a strange parallel between the rise of the merger movement and the intensified increase in production and productive capacity. Large scale consolidations represent huge investments in plant and machinery. Their technique is mass production and mass distribution. Unfortunately not all of them have pursued a scientific study of market capacity. Not all of them have adjusted their production programs accordingly.

Despite the merger and consolidation activity, competition in industry appears to have been as intense as ever before. When productive giants engage in a race for the market, it is not difficult to see how the market becomes inundated. It is quite true that some of the larger and more ably managed combinations have pursued a policy of production control with relation to the market which may well serve as a model for other industrial enterprises.

Proposed Amendment in Relation to Mergers

Is a change in our merger policy necessary? In the light of our recent stock market experience with its inflated securities' levels, due in no small part to the indiscriminate merger activity of the period, would it not be wise to adopt some measure that will tend to prevent its tragic recurrence?

Now, what can or should be done in that regard? In the first place, the Government, lacking the appropriate machinery, has been unable to keep account of the innumerable consolidations, except through the unreliable method of following newspaper announcements. The Government is in no position today to furnish adequate information as to the nature, character and extent of the mergers and consolidations that have been effected through these years.[5]

What we require is, first—reliable data, authoritative information. The merger movement and its various manifestations are of vital concern to the Government and to the whole nation. The Federal Government should not be dependent upon the haphazard information that may be gathered from newspapers. To that end, my suggestion would be: First—that all mergers, amalgamations or consolidations contemplating interstate commerce, with a capitalization above a certain minimum specified figure, be required to file their merger plan with some duly constituted agency, either existing or newly created—possibly with the Federal Trade Commission—furnishing full details concerning their program, projected operation, capital structure and all incidents relating thereto.

Full information should be furnished concerning any such plan of organization, the purpose being mainly to keep a proper Governmental Agency and the public fully informed as to what mergers or amalgamations are about to be organized. Such an agency would then be in a position to make an intensive and extensive study of the merger situation at any given time. If any legislation can be of aid in facilitating sound consolidations in industry, or otherwise promoting the public welfare, such an agency would be in a position to make intelligent recommendation.

May I suggest that there is and should be nothing in this thought that smacks in any sense of Governmental interference with business. Its primary purpose is educative, so that in connection with this vital matter, the Government and the public will be reliably and accurately informed.

Incidentally, too, if it appears from the reports filed that a merger is about to be effected which is clearly and distinctly violative of law, the Government will be in a position to take timely action and avoid the serious injury which inevitably follows to innocent stockholders where action is delayed until the issues have been floated.

Secondly—that such Governmental Agency be authorized to receive the merger plan and be empowered either to approve or disapprove of that plan in advance of organization, when requested to do so by those interested. A disapproval may always be subject to review by the courts. This provision should be entirely permissive and optional with those that are interested in securing an advance opinion.

It is quite true that dissolution of a corporation is often the result of abuse or misuse of the powers acquired by consolidation or merger, after the merged unit has begun to function. The Government cannot very well be called upon to sanction a course of conduct in that regard before the institution has begun to operate. But the Government can approve or disapprove the plan of merger as such. If, after the merger, the powers acquired are abused to the public's detriment, the Government can proceed by civil process to secure appropriate remedy.

It is eminently unfair to invite innocent stockholders in large numbers to invest in an enterprise with the uncertainty hovering over the enterprise, that a possible dissolution suit may be instituted and that there may be a dissolution of the entire consolidation. Where uncertainty can be removed from the law it is simple justice to remove it. Where illegal mergers can be prevented at the outset, they should be prevented. If lawful consolidations and combinations could be freed from the

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4. Mr. Justice Brandeis dissenting in *American Column & Lumber Co., et al.* v. *U. S.* (1921), 257 U. S. 377, 419.

5. See *Annual Report to Congress of the Federal Trade Commission for the year to June 1930*, at page 51. "No official record is maintained or is practical to indicate the number of acquisitions, consolidations and mergers effected throughout the country."

fear of illegality at any stage of their progress, it seems to me it would lend a greater security to the legitimate growth and conduct of sound business.

The good faith of big business in its effort to comply with the law is best evidenced by the many requests for preliminary approval which have been submitted to the Attorneys General in recent years only to be met with the response that there is no provision in existing law authorizing such procedure. In some instances the Attorney General has given assurance that from the facts presented he saw no need to proceed immediately against the proponents of the plan.[6]

So much for that part of our Anti-Trust Laws which relates to mergers, and now we approach a consideration of the second large domain in which these laws operate.

The Trade Association as an Economic Factor

May I suggest that current discussion has failed to give due regard to the opportunities that are open to trade associations under existing law. It is estimated that there are approximately 14,000 of these trade groups in the country. Some of them have memberships running into thousands. Conservatively, if we are to assume that the average membership is one hundred, those fourteen thousand trade associations represent close to a million and a half merchants. They constitute the backbone of the nation's business.

Those groups of men, representative of every shade of industry throughout the land, are undoubtedly best qualified to solve their own business problems. What may be applicable to one phase of industry will not apply to another. What may be helpful to one kind of business may be harmful to another. It is the men who live with that business who know their industry best.

Measures and remedies which will accord to these groups a freer hand, a greater measure of freedom in cooperation, to study and to solve their own peculiar problems, should be encouraged by the law. We shall have occasion as we proceed, perhaps, to indicate a little more definitely just what direction those measures might take insofar as our Anti-Trust Laws may be of help in speeding business recovery.

Trade Associations and the Law

It is obvious that any laws regulating the conduct of these multitudes must of necessity be general in character. The framers of the original Anti-Trust Act, realizing this difficulty, wrote the law, in what may properly be described as broad, general language. The necessity for that type of a law at that time is obvious. In its operation and enforcement, however, the law has by slow degrees been particularized. The more obnoxious forms of Anti-Trust violation have presented little difficulty. When a group indulged in a boycott of a competitor with the intention of destroying him and his business there was never any doubt as to the illegality of such a course, and that is applicable, too, to the various forms of unfair competition and oppressive tactics well known to the common law before the enactment of the Anti-Trust Statutes.

When we came to the question of whether a trade association group is to be permitted to indulge in price fixing on a reasonable basis, or to divide the market among themselves, or exchange information as to prices, under some open price plan, or standardize their commodity, there was decided difference of opinion. From time to time important cases have arisen which have settled these questions one by one with clarity and precision. And, so, it was held in the Potteries case that price fixing by a group, however reasonable the price, is illegal and violative of law, and so is an allocation and division of territory among its members.[7] Standardization of a commodity by the group is entirely legal.

Now, the question is, shall we amend our laws so as to permit reasonable prices to be fixed by the group? Shall we amend our laws so as to permit agreements to curtail production among the group? In what other respects, if any, can we facilitate the activity of the group by amendment of our Anti-Trust Laws?

Overproduction and Price Fixing by the Group

That leads us to the basic and all important question of the day in industry,—the problem of overproduction. If you visualize a huge machine reaching across the country, continually improved in its productive facilities through the medium of patents and inventions, always reducing thereby the quantum of manual labor required, pouring forth ever increasing volumes of merchandise, you will have somewhat of a picture of the progress of manufacture and industry generally during the past decade.

So long as the rest of the world, depleted of men and capacity through the war period, was slowly being rebuilt, an available market was presented for the consumption of surplus merchandise.

Now, if you have a conception of this huge machine that I have pictured, with its outpouring of merchandise, and then visualize these foreign markets rebuilding themselves and reducing their own demands from abroad, while our local markets are contracting, and in addition to that you see erected price barriers either by artificial price fixing or by the medium of high tariffs, you are very much apt to see too, the damming up of the flow of merchandise and the accumulation of commodities to a point where the market is glutted and industry cannot operate on a profitable basis. It seems to me that any further attempt at this time to encourage artificial barriers by permitting trade associations to indulge in price fixing would certainly tend to reduce consumption; that on the contrary, we should make every effort to permit the free flow of merchandise and trust to a larger consumption.

Throughout this discussion of economic conditions, you hear a strange note sounded by the bankers and those who are observing the financial end of the economic structure. Mr. Paul Warburg announces that the evil of the day is to be found in artificial price barriers erected either through tariff walls or by price maintenance schemes; and Mr. Albert Wiggin declares in the same tenor that price

6. *Address of Attorney General William D. Mitchell* at the annual meeting of the American Bar Association, Memphis, Tennessee, October 25, 1929.

7. *U. S. v. Trenton Potteries Co. et al.*, 273 U. S. 392 (1927).

barriers maintained by trade combinations, tariffs and similar artifices are a hindrance to a speedier business recovery.[8]

These laws, as you will undoubtedly observe, reach right into the heart of the business of the country. They cannot and should not be lightly tinkered with. What seems at first blush as the right remedy, and an easy cure, may prove to clog up the machine further, and to prevent its easy functioning.

Curtailment of Production and the Law

The problem of curtailment of production presents quite a different situation. Shall we slow up this huge machine? Shall we permit, in other words, these millions of men, banded into associations to make definite agreements to curtail the output of their merchandise?

How far does existing law guard against the menace of overproduction? What activities may trade associations pursue under the decisions which will avoid drugging the market with goods? It is no exaggeration to say that by and large, merchants are not aware that existing law accords to their trade associations every opportunity for determining the state of the market with respect to production and with respect to many of the details relating to production. We cannot emphasize too strongly that trade associations generally have not availed themselves of those facilities.

First, as to the volume of production. It is proper for the members of a trade association to report to their central agency the volume of production and the capacity of their output. That information may be tabulated by the central agency and may be disseminated among the members, so that each of the members can at all times, under existing law, keep himself fully informed as to the quantity produced by his group in the industry and the respective capacities of its members.

The members may report their stocks on hand at any given period, and that information may be generally disseminated.

The members may in turn report to their central agency the cost of their product so that each member is not only aware of the quantity produced by the group, but may also check up his own cost to see whether or not he is wasteful in production cost.

And the members may under existing law report to the central agency and to each other the actual prices which their commodities have brought in past transactions. The better opinion seems to be that the members may report the unfilled orders on hand and exchange that information among themselves.

The inhibitions of the law are against agreements which fix a given price or agreements which curtail production. Our Supreme Court even goes so far as to recognize that the dissemination of all of this information will have an inevitable tendency to regulate production and to stabilize prices. Indeed, that information is allowed to be disseminated among the members for the very purpose of permitting enlightened individual freedom of action both with regard to price and with regard to production. The law makes no objection to the fullest education of each member in his own industry so that he can intelligently determine what his quantum of production may be, or what his price should be. Our law goes so far as to permit discussions on these subjects of cost and of quantity of production at open meetings.[9]

There is a vital distinction between these permiserable activities and an agreement among the membership to maintain a certain price or to curtail production.

Too many of our trade associations are ignoring these privileges under the law. Their members, either unaware of their rights under the law, or fearful that the exercise of those rights may be misconstrued by an overzealous prosecuting officer, have been exceedingly slow to avail themselves of these opportunities for knowledge which will aid in their intelligent conduct of their respective business.

Mr. John Lord O'Brian, the assistant to the Attorney General and head of the Anti-Trust Division of the Department of Justice, has declared, in a recent address, as follows:

> "Every experienced lawyer knows how much Trade Associations have contributed and are contributing to the development of a sound public opinion in the special fields of industry. No one understands this better than the law officers of the Department of Justice, and I can assure you that that Department is not in the slightest degree hostile to the proper activities and healthy growth of Trade Associations."[10]

At the same time Mr. O'Brian emphasized that he has no alternative but to enforce the law as it stands, as indeed he must.

If each member of his trade group were to keep himself fully informed as to the condition of the market, as to whether or not it has been overproduced, it is my belief that the menace of overproduction in industry would be considerably alleviated. The difficulty with the existing situation is not so much in the law as it is in the fact that the members of these trade associations for years were grinding out merchandise without knowledge of the essential facts relating to production in their own industry.

The Federal Trade Commission, after a survey of Trade Associations, reports:

> "Dissemination of statistics on produciton and sales, unfilled orders, orders on hand, etc., has, in itself resulted in curtailment of output at certain times. For example, if a manufacturer receiving such statistics covering a representative portion of the industry in which he is engaged, notes that production in the industry is exceeding the demand for the industry's product, resulting in increasing stock on hand, he will, in all likelihood, decrease his output to a certain extent. Other manufacturers in the industry may do likewise and production in general may be curtailed until such time as the statistics show orders increasing and stocks on hand diminished. This is, at least, a natural result of the statistical exchange. Statistical exchange has doubtless often operated to check the addition of new producing units or the replacement of units abandoned through necessity. In some instances curtailment has been made necessary by outside forces, such as insistence by bankers for credit reasons."[11]

8. (a) *Address by Paul M. Warburg, Chairman, The Manhattan Company*, at joint meeting of the Board of Directors, January 8, 1931.
(b) *Report of the Chairman of the Governing Board, Chase National Bank*, Jan. 13, 1931.

9. *Maple Flooring Manufacturers Association et al v. United States*, 268 U. S. 563 (1925). Opinion by Mr. Justice Stone.
See Benjamin S. Kirsh, *Trade Associations, The Legal Aspects*, Chapt. II, Trade Association Statistics.

10. *Address by the Honorable John Lord O'Brian*, delivered before the U. S. Chamber of Commerce, at Washington, D. C., May 1, 1930.

11. *Report on Open Price Trade Associations*, by the Federal Trade Commission in response to Senate Resolution, 1929, pages 279-280.

Proposed Amendments in Relation to Overproduction and the Trade Association

Now in what way can we amend our laws so as to afford a greater facility for the work of these innumerable trade associations scattered as they are throughout the country?

In the first place, we are averse to having too much government in business, and in the second place it must be admitted that those who are engaged in a given business know their own business best. They know their own peculiar problems and they are most apt to know their ailments and their remedies.

Take, for instance, the oil industry. One of the causes for oversupply and overproduction is to be found in the fact that where there are two adjoining oil operators in a pool, each finds it necessary to extract that oil as soon as possible for fear that the other operator will get more than his fair share. They have been clamoring for what is known as unit operation in a pool.

Consider the cotton textile industry. For years it has been what is known as a sick industry, with the market tremendously glutted. We find them still working women and children in night work in cotton mills in the South.

Examine the bituminous coal industry. That presents seasonal difficulties. It is impossible to tell in advance how long the frost is going to last and how far South it is going to reach; what extraordinary or unusual demand may be made at any time, and so mine owners have increased their capacity to enormous proportions to be able to meet seasonal demands. That increased capacity represents increased capital—that capital must return a dividend and so in turn the machine is kept grinding even when there is no demand or when the demand has subsided. In recent years coal has met with keen competition from fuel oil, natural gas and water power.

On the other hand, you take an industry like rayon. That is one business where they cannot keep up with the demand. The production of rayon in the world has risen continually, yet overproduction can scarcely be said to be a problem there.

In other words each industry has its own peculiar problems relating to production and there must be that flexibility in the law which will permit groups in industry to devise ways and means by which some cooperative action will be assured to solve their own special problems. Since it seems that most of these problems converge on the subject of production, wouldn't it be wise to have a central government agency that will be authorized to pass upon and to receive a submission from a trade group or a trade association, of a production plan or program, worked out by the members of that industry—that governmental agency to be authorized, in appropriate cases, warranted by the facts, after a thorough investigation, to approve or disapprove production programs or production plans, and this always subject to court review?

Caution should be taken to circumscribe the authority of this agency so that it should in all respects function in accordance and in compliance with our Anti-Trust Laws, as they stand and as amended, in relation to production programs or production plans. The agency should be given the power in specific cases to permit agreements by a group to operate according to a certain production plan even if curtailment or regulation of the quantum of production in the industry thereby results.

No such power is today vested in any board or any governmental agency. Attorney General Mitchell has declared that he has no alternative but to enforce our Anti-Trust Laws and that agreements to curtail production are violative of those laws.[12]

A suggestion has been made by several eminent authorities that our natural resource industries be exempted from the operation of our Anti-Trust Laws so that they may adequately regulate their production as a conservation measure. That would apply to oil, coal, minerals and similar industries. But the difficulty of overproduction does not stop with our natural resource industries. It is characteristic of a great many other industries throughout the country. It does not require repeal of our Anti-Trust Laws or their nullification to permit industries generally, where the facts warrant, to regulate their production.

Of course, in all measures for curtailment of production, the problem is not as simple as it seems. In the first place, unless agreements for curtailment of production are closely supervised, they are very much apt to aggravate our unemployment situation. Secondly, they bear a close relation to price control and in times of underproduction may become oppressive. In the third place, as merchants have pointed out, there is no certainty or assurance that all the members of a trade group will enter into or observe agreements for curtailment of production. Those present problems peculiar to each specific industry. What may apply to one trade association may not apply to another. The Governmental Agency vested with discretion in the matter of permitting production programs could guard against abuses of one form or another.

We are not without precedent in this regard. Similar measures have been in force in our export trade, in our shipping trade and in the marketing of agricultural, dairy and live stock products, where trade groups have been permitted to work out their difficulties, and if they have not cured the evils complained of they have in some instances, at least alleviated the situation.[13]

Conclusions

(1) Under the existing law there is no adequate machinery for the gathering of reliable data or information concerning mergers and consolidations in industry. The subject is of sufficiently far reaching consequence, particularly because of its recent history to warrant careful study based upon

12. Letter of the Attorney General, March 29, 1929, to the Secretary of the Interior as chairman of the Federal Oil Conservation Board in response to an inquiry concerning approval of plans of crude oil producers to curtail production.

13. (a) *Webb Export Trade Act* [Act of April 10, 1918, 15 U. S. C. 61-65].

Compare *Annual Report to Congress of the Federal Trade Commission for year ended June 30, 1930*, pp. 125, 129:

"At the close of the fiscal year ending June 30, 1930, 57 export associations were filing papers with this office under the Webb-Pomerene law."

"These groups represent producers, mills, mines, and factories scattered throughout all parts of the Union. . . . A tendency toward market stabilization makes for better prices as a whole, a more steady volume of business, and a more uniform movement of products. These advantages in export trade have been summed up by one of the older associations as follows: 'Continued operation under this

reliable data gathered by a responsible governmental agency. We therefore favor: That all mergers and consolidations above a minimum specified capitalization be reported to the government in fullest detail.

(2) To guard against indiscriminate and illegal mergers, to aid members of the bar in advising clinics, to make for clarity and certainty in the operation and enforcement of these fundamental laws, they should be amended so that a merger and consolidation program may be submitted to a central Governmental Agency for its approval or disapproval in advance, reserving in the Government always the right to proceed by injunction to curb abuse or misuse of the merger powers acquired, where those powers have been abused subsequent to the original set-up and in the conduct of the business of the merger.

(3) Let our Anti-Trust Laws be amended so as to vest in either the same or existing or newly constituted Federal Agency the power to approve or disapprove any production plan or program for trade association activity, having power where the facts warrant to permit regulation or curtailment of production in an industry; such a Board to function entirely in accord with the requirements of our Anti-Trust Laws as thus amended, and always subject to court review.

(4) Finally it may be advisable to consider a method of licensing Trade Association groups, the license to be optional and revocable and to carry with it an immunity from the criminal and treble damage features of the law, provided there is at all times full disclosure of activities to the Government. Such a measure may well serve to promote freedom of discussion and freedom of lawful action among the members with relation to the many vexing problems confronting industry today. The Government, having possession of the facts, could always proceed by civil process to secure injunction or revoke the license where the privileges have been abused or where the conduct is violative of the laws as they stand. It is undoubtedly true that many members of trade groups are fearful of open and proper discussion or even lawful or permissible joint action by reason of the conspiracy provisions of the laws.

None of these proposals seeks to inject the government any further into the domain of private business. On the contrary the first aims to secure reliable information on a major factor in industry; the second aims to release the rigor of the present law and remove one element of uncertainty often complained of; the third removes the restraint of the law which prevents needed regulation of production; and the last proposal would enable men in industry to have full, free and open discussion concerning their own business among their own groups, within the law, without the hazard of criminal punishment therefor.

plan has a cumulative effect which we have found very beneficial as years go by.'"

(b) *Shipping Act, 1916* [46 U. S. C. 814, 815] Sect. 15. Compare *Annual Report of the U. S. Shipping Board*, Bureau of Regulation, for year ended June 30, 1930, page 24.

"Four hundred and twenty-four copies or memoranda of new agreements and of modifications of existing agreements filed with the bureau for the board's approval were analyzed and passed upon in connection with the lawfulness of their provisions under the various regulatory sections of the Shipping Act. These agreements and modifications in most instances projected extensive plans for cooperative relationship between carriers fixing rates or fares, regulating competition, pooling or apportioning earnings or traffic, allotting ports, and other matters as to which section 15 requires board approval before being carried into effect. Numerous interviews were had in the bureau's offices with attorneys and other representatives of carriers relative to many of the documents filed under this section, which as originally presented contained provisions objectionable or questionable under one or more of the regulatory sections of the statute. . . . The details of the agreements . . . in the main unmistakably reflect more closely studied and well directed efforts by the carriers to stabilize rate and traffic conditions. . . . The total number of all approved agreements on file as of June 30, 1930, is 1,478, of which 172 are conference agreements."

(c) *Capper Volstead Act*, [Act of Feb. 18, 1922, 7 U. S. C. 291, 292].

The Cooperative Marketing Act [Act of July 21, 1926, 7 U. S. C. 451 to 457]

PREVENTION RATHER THAN PUNISHMENT FOR CRIMES

By Hon. Stephen H. Allen
Former Member of the Kansas Supreme Court

I WISH to confer through the columns of the JOURNAL with my brethren of the Bar about the crimes problem. If any excuse for doing so is needed, the facts that thousands of acts, some of them moral and some immoral, have, during the life of the Republic, been made crimes by Federal Statutes, and thousands of others by the laws of the states; that our scheme for dealing with them is one that has come down to us from the dark ages and is archaic and inefficient, and that the public is and long has been keenly alive to the unsatisfactory results of our dealings with criminals, seem to me sufficient reasons for discussing it.

It appears to me that we begin our work at about the place where little ought to be required, and end it nowhere. We wander around in a wilderness of inconsequential, half-hearted efforts to suppress crime in ways that long experience proves it cannot be done.

If the ordinary good citizen be asked, "What criminal laws are on the statute books that you are liable to violate?" he is likely to say, "Not any; I am a law-abiding citizen." But if the same question be asked the learned lawyer with whom he sometimes consults, a very different answer will be given. He will say, "I don't know." We all violate some criminal laws sometimes, and some of us many of them many times. The ones most frequently violated are the Sunday laws that scarce anybody now observes in their entirety, the assessment and taxation laws, that invite perjury and penalize the comfortably well-off citizen for telling the truth, the automobile and road laws, some of which are antiquated or too inconvenient to be obeyed all the time,

the gaming laws which may even hit the church that has a pious gift enterprise, or the militant prohibitory law, that makes many acts crimes that some good people regard as innocent and the doing of them within every mans' natural rights.

If you will think these over carefully, you are not likely to have any difficulty in convicting yourself of some crimes, and convincing yourself that your neighbors are no better. Applying statutory definitions, we find that all of us that amount to anything are unconvicted criminals, and that there is no criminal class to segregate from the social mass.

What does society do or try to do?

Catch and punish criminals. Does it catch them? Yes, as to a very small part of them; no, as to the great mass of others. Why are not more of them caught? First, because there is no desire among prosecuting officers to prosecute good citizens who only violate old laws for which they have no respect, second, because they cannot catch others they wish to prosecute, third, because of a variety of human impulses and weaknesses that cause officers and citizens to do nothing and say nothing about those offenses that they think may as well be forgotten.

Manifestly no officer who attempted the impossible task of prosecuting all of us who violate some statute could be elected to any office or even live in the average community.

What do we do to those we catch? Confine them, feed and clothe them during a fixed period, school the most resolute of them in methods of committing crime and escaping punishment, and then turn them loose to return to their old criminal associates or find new ones with whom to renew their criminal activities in a hostile world.

The state cannot and does not wish to punish all criminals. We do not belong in jail, and have no desire to be put there. But there are bad people who must be restrained. Who are they? This is a large question, not susceptible of a complete answer from me.

Whoever they are and whatever their characters, they came into the world by no act and with no knowledge or consent of theirs. Equally so they pass through the years of complete dependence to the time when a conscious will develops. Even from then on their activities will be largely dependent on their environments. Is this where the responsibility of society begins? Soberly and earnestly it is nearer where it should end safely. If there are grave responsibilities resting on society they are, first, that of preventing the propagation of children by imbeciles and defectives, by those who are clearly incapable of bearing healthy offspring, second, the care of neglected, helpless infants during their development. It is from such as these that most of the irresponsible and morally weak develop; many of them to become what we term real criminals.

Here we arrive at the stage that shows how archaic our criminal laws are. Instead of sterilizing the harmful and imperfect germs, we have left them to scatter under the impulses of passion and devoid of reasoning restraint. Instead of strengthening the pliable tender sprouts, we have heaped obstructing rubbish on them. We have made no systematic effort to prevent crime or the propagation of the development of criminals.

There are ample statistics showing the numbers of youths and adults in penal institutions, the acts for which they have been sentenced, the terms of their punishment and the cost of keeping them. These are useful, but as aids to a solution of the problem under consideration begin nowhere and lead to no definite result. If it is to be dealt with as though it were a new one, the first thing the state must do is open its eyes to the facts as they are. How many imbeciles or seriously defective children there are, one or both of whose parents were similar defectives, I do not know, nor has the state attempted to gather the information for me. But I do know families of prolific breeders who have gone on giving birth to imbeciles and defectives from generation to generation. These became either criminals or helpless public charges. A census of all such and of homeless and neglected children could easily be made in connection with state or national censuses with but negligible added expense. But, you ask, how ascertain those of well defined criminal tendencies? From the homes and the schools. Children are both the keenest observers and the best judges of character and capacity that we know of. Their associations are closest, giving them the best opportunities for knowing, their impressions are the most vivid and their judgments most unbiased. In school, on play-ground and wherever else they meet, they have ample opportunity and abundant incentive to know the characters and capacities of their playmates. Little school children have pointed out to me offspring of highly respected parents having decided criminal inclinations, who in later years committed serious crimes of the kinds forecast.

Reformation of character is an individual, far more than a class, problem. Each person is to be dealt with on the basis of his personal character and capacity. These should be shown in the census as well as is possible.

Having such a census, what use can be made of it? The state cannot prevent the birth of every defective, but it can prevent those persons who are clearly defectives from breeding. In the present state of the science of surgery this can be done not only without injury but with positive benefit to those operated on. The expense of such operations on all requiring them would be negligible. The relief from the burden of caring for defective progeny would be very noticeable. All children born into the world must be disposed of or cared for in some way. The ancient Greeks exposed their defectives and let them die. Modern society is too tender-hearted for this, however good the effects might be. Fortunately there is now no occasion for any exhibition of public heartlessness.

Doubtless a large majority of the neglected children needing public care are the offspring of parents classed as normal. All children who are a public charge have precisely the same needs that those having loving parents do. Food, clothing and shelter they must have, but, if criminal tendencies are to be prevented, they must have moral training, useful activities and loving care. Any place that will give them these in full measure is a fit place for them. None other is. Perhaps large institutions of this kind are possible, but I know of no full sub-

OUR ANTI-TRUST LAWS AND THE ECONOMIC SITUATION

Fundamental Purpose of Our Anti-Trust Laws—Current Economic Conditions—The Merger Movement—Mergers and Overproduction—Proposed Amendment in Relation to Mergers—The Trade Association as an Economic Factor—Overproduction and Price Fixing by Group — Curtailment of Production and the Law—Proposed Amendment, etc.*

By David L. Podell
Member of the New York City Bar

FOR some forty odd years, our Anti-Trust Laws have been the subject of discussion, controversy, litigation and innumerable court decisions. More recently our economic status has called forth a volume of opinions and discussions from economists, bankers and merchants. Many and varied have been the views expressed. President Hoover, in his message at the opening of the present session of Congress, recommended that Congress institute an inquiry into some aspects of the economic workings of these laws.

Laymen generally have given expression to the thought that our bar might be of greater assistance in the effort to solve certain pressing legal economic problems inherent in these laws.

If the remarks that I shall have occasion to make this afternoon serve the purpose of provoking and stimulating a study of these problems among our bar, they will, perhaps, have been justified.

Fundamental Purposes of Our Anti-Trust Laws

The aim of our Anti-Trust Laws is to preserve inviolate the principle of free, fair, and open competition. In other words, everyone, under our system of law, has the right to go into any business and conduct it as he chooses, freely, according to law and according to his own best lights. Under these laws we shut out no man from any business or industry no matter how overcrowded that industry might be. We aim to keep wide open the door of opportunity to large and small business and to the individual. At the same time the laws seek to protect the consumer so that he may purchase his commodity at competitive prices in a free and open market.

These may be said to be the fundamental aims of our Anti-Trust laws as distinguished from the basic principles of cooperative or communistic programs which submerge the individual and make him an infinitestimal part of a grand scheme of business conducted by government.

We have not even favored a system of cartels generally prevalent among European countries. Those may best be described as close associations operating under government supervision where industry is rationalized and standardized and made to operate in accordance with given formulæ, in given territories, upon given price schedules and upon a basis of allotted production.

We have not seen that the cartels or any other governmental schemes can produce or have, in the long run, produced a better standard of living, or have in any sense, worked better results in industry than our own system of individual freedom of business, particularly when we have in mind the standards of living attained in this country in comparison with the standards attained in countries which pursue the other economic philosophies.

For that freedom of opportunity we have to pay a certain price, a certain toll. The tremendous advantages of a free market, of individual initiative, energy or genius, are not without their disadvantages. We find certain industries and certain businesses overcrowded. We find that that overcrowding, at times, contributes towards the overproduction of commodities. We find, at times, that price-cutting is so intense as to make production of a commodity on a profitable basis extremely difficult. Particularly in days of depression, do we feel these disadvantages keenly.

Do they have to be endured in order to preserve the great underlying principles of freedom of opportunity, freedom of competition, freedom of individual initiative in business? That is the great problem of Anti-Trust Legislation. By what method of amendment may we so far reduce the disadvantages to a minimum and preserve the benefits of those Anti-Trust Laws for the community?

Current Economic Conditions

We have been, for the past year, passing through a weeding out process in industry. Weaker enterprises, mushroom growths, institutions unsoundly financed have here and there been falling by the wayside. The retirement of these industries from the field and the effort of the sounder institutions towards retrenchment for self-preservation have created a widespread unemployment situation. Merchants, bankers, economists, men in both political and business life generally, are satisfied that with time, conditions will adjust themselves. Indeed, some have said that there are signs, here and there, of slow recovery.

Throughout this period of stress, the American public has naively turned to the process of legislation of some panacea, some cure-all, that will restore prosperity. Naturally attention has been focused

*Address delivered before the New York County Lawyers Association February 6, 1931.

on that portion of our laws which is most intimately bound up with the economic fabric of the country, our Anti-Trust Laws. Various amendments and modifications have been proposed. Some have favored relaxation of the criminal features of the law—the usual arguments have been advanced against their uncertainty—and others have argued for the complete repeal of all of the Anti-Trust Laws. It is to be expected that in an abnormal or subnormal period unusual and extraordinary measures will be proposed.

There is no doubt that the majority of our business organizations is headed by groups of law-abiding, right-thinking citizens. It is largely due to their enlightened policies in the management of big business that the public has been won over to a wholesome respect, at least a friendly tolerance, of the so-called trusts. The agitation and resentment against big business which gave birth to the Anti-Trust Laws have been largely converted into a feeling of good will and an acceptance of the essential proposition that with the march of time huge aggregations of capital and concentrations of industry are necessary to commercial progress.

The capital issues of these large combinations have been widely and popularly diffused. Big business is no longer the threatening octopus of the nineties. There can be little doubt that the restraining hand of the Anti-Trust Laws has played no small part in the development of a higher ethical standard for business, big and small. There is equally no doubt that there is and has been a minority who are and have been ready to indulge in the ruthless tactics of business piracy, and that in the main, this great law, or body of laws, has acted as a wholesome deterrent to prevent oppression of small merchants and to keep our markets open for the benefit of the multitudes of consumers.

There is one conclusion about which there is very little doubt in my own mind. A repeal of our Anti-Trust Laws would work a grievous injury to the thousands of smaller business units scattered through the country and would prove to be disastrous to many of them. Laws that have withstood the assaults of powerful business organizations for four decades must have fundamental merit. Unless we are prepared to allow a selfish minority to return to the days of the ruthless boycott, of illicit rebates, of commercial espionage, of all the tactics of oppression and coercion which gave birth to these great laws, we must not repeal them.

All of this, however, does not mean that there is not ample room for improvement in the operation of the laws and in their enforcement. It is eminently fitting that lawyers make a study of those evils or maladjustments in business which bear a direct relation to the laws, and consider such amendments as will facilitate the proper conduct of business.

The Merger Movement

These laws divide themselves naturally into two domains. First, the merger or consolidation, and secondly, what has come to be known as the trade association.

In the five years prior to 1929, this country, indeed the world, has gone through an extraordinary merger period. In 1923, in manufacturing and mining alone, the estimated number of concerns participating in mergers or amalgamations was 378. In 1928, the number totalled 1,259, an increase of nearly 400%.[1] Figures for mergers in all lines of industry, trade and commerce for the same period are not available, except through the compilation of merger reports in newspapers. But the accelerating trend toward consolidation was quite evident in motion pictures, department stores, chain stores and wholesale distributing units of branded products, the so-called circular merger. Banking institutions kept pace with the general tendency toward concentration. During this period over five thousand banks disappeared, largely as a result of mergers. The Federal Reserve Board remarks:

> "During these years progressive integration of banking control has in its larger aspects clearly reflected—although it has followed rather than preceded—a similar integration of control which has been in process through industry generally. Consolidation has gone less far in the field of banking than in many lines of manufacturing, marketing and public utility operations."

One per cent of the banks reported one-half of the banking resources of the nation.[2]

The degree to which our Anti-Trust Laws directly affected the merger process is of peculiar interest. When in 1904 the Supreme Court of the land declared the Northern Securities merger, effected through the medium of a holding company, violative of law, for many years following, the merger movement, especially through the holding company device, receded. In 1920, as a result of the decision of the Steel case which declared that mere size in itself is no violation of law, the merger movement was revived and continued unabated, increasing in intensity until what might be called its collapse in the latter part of 1929.[3]

Let us pause for a moment to consider certain prominent features of this merger period. Most of them were reflected in the securities market.

Where the combination or merger is of a character involving a multiplication of similar units, best typified by a utility,—while the problems of management are always difficult, the uniformity of structure naturally lends itself to greater management facility. If the nature of the business is such as to involve change in style, in commodity, perishability of commodity, seasonal changes in commodity, it begins to present a far greater difficulty in the matter of general management policy. In short, it is not as difficult to manage a huge institution like a telephone company as it would be to manage a national wearing apparel institution, the latter having so large an element of change, of shifting of style, of shifting of commodity.

It is well known that there are some industries which, from their very nature, do not lend themselves to large scale consolidation.

In a feverish securities market such as we have just passed through, promoters are apt to overlook the normal safeguards to sound business consolidation in an effort to satisfy the public demand for new issues. We are all wiser after the event, yet

1. Report of the Committee on *Recent Economic Changes*, 1929, Volume 1, page 184.

2. *Annual Report of the Federal Reserve Board covering operations for the year 1929*, pages 29, 30.

3. *U. S.* v. *Northern Securities Company* (1904), 193 U. S. 197; *U. S.* v. *U. S. Steel Corporation* (1920), 251 U. S. 417.
See National Industrial Conference Board. *Mergers and the Law.* 1929. Prepared by Mr. Myron W. Watkins.

it would be most unfortunate if from that wisdom we did not learn the lesson that will guide us to avoid similar disasters in the future.

A peculiar anomaly exists in our Anti-Trust Laws which has also in some measure contributed to the rise in the merger movement in the past ten years. Competitors in any given line of industry, formed in a trade association, are not permitted to agree upon production schedules and uniform prices. When they consolidate, amalgamate or merge into a single unity, the laws' restriction vanishes. They may then curtail production,—they may and do fix one price.

Several years ago Mr. Justice Brandeis in his dissenting opinion in the Hardwood Lumber case, argued for a greater freedom for trade associations, and concluded his opinion with this question:

> "May not these hardwood lumber concerns, frustrated in their efforts to rationalize competition, be led to enter the inviting field of consolidation?"[4]

Mergers and Overproduction

As to the evil of overproduction, it is noteworthy that there is a strange parallel between the rise of the merger movement and the intensified increase in production and productive capacity. Large scale consolidations represent huge investments in plant and machinery. Their technique is mass production and mass distribution. Unfortunately not all of them have pursued a scientific study of market capacity. Not all of them have adjusted their production programs accordingly.

Despite the merger and consolidation activity, competition in industry appears to have been as intense as ever before. When productive giants engage in a race for the market, it is not difficult to see how the market becomes inundated. It is quite true that some of the larger and more ably managed combinations have pursued a policy of production control with relation to the market which may well serve as a model for other industrial enterprises.

Proposed Amendment in Relation to Mergers

Is a change in our merger policy necessary? In the light of our recent stock market experience with its inflated securities' levels, due in no small part to the indiscriminate merger activity of the period, would it not be wise to adopt some measure that will tend to prevent its tragic recurrence?

Now, what can or should be done in that regard? In the first place, the Government, lacking the appropriate machinery, has been unable to keep account of the innumerable consolidations, except through the unreliable method of following newspaper announcements. The Government is in no position today to furnish adequate information as to the nature, character and extent of the mergers and consolidations that have been effected through these years.[5]

What we require is, first—reliable data, authoritative information. The merger movement and its various manifestations are of vital concern to the Government and to the whole nation. The Federal Government should not be dependent upon the haphazard information that may be gathered from newspapers. To that end, my suggestion would be: First—that all mergers, amalgamations or consolidations contemplating interstate commerce, with a capitalization above a certain minimum specified figure, be required to file their merger plan with some duly constituted agency, either existing or newly created—possibly with the Federal Trade Commission—furnishing full details concerning their program, projected operation, capital structure and all incidents relating thereto.

Full information should be furnished concerning any such plan of organization, the purpose being mainly to keep a proper Governmental Agency and the public fully informed as to what mergers or amalgamations are about to be organized. Such an agency would then be in a position to make an intensive and extensive study of the merger situation at any given time. If any legislation can be of aid in facilitating sound consolidations in industry, or otherwise promoting the public welfare, such an agency would be in a position to make intelligent recommendation.

May I suggest that there is and should be nothing in this thought that smacks in any sense of Governmental interference with business. Its primary purpose is educative, so that in connection with this vital matter, the Government and the public will be reliably and accurately informed.

Incidentally, too, if it appears from the reports filed that a merger is about to be effected which is clearly and distinctly violative of law, the Government will be in a position to take timely action and avoid the serious injury which inevitably follows to innocent stockholders where action is delayed until the issues have been floated.

Secondly—that such Governmental Agency be authorized to receive the merger plan and be empowered either to approve or disapprove of that plan in advance of organization, when requested to do so by those interested. A disapproval may always be subject to review by the courts. This provision should be entirely permissive and optional with those that are interested in securing an advance opinion.

It is quite true that dissolution of a corporation is often the result of abuse or misuse of the powers acquired by consolidation or merger, after the merged unit has begun to function. The Government cannot very well be called upon to sanction a course of conduct in that regard before the institution has begun to operate. But the Government can approve or disapprove the plan of merger as such. If, after the merger, the powers acquired are abused to the public's detriment, the Government can proceed by civil process to secure appropriate remedy.

It is eminently unfair to invite innocent stockholders in large numbers to invest in an enterprise with the uncertainty hovering over the enterprise, that a possible dissolution suit may be instituted and that there may be a dissolution of the entire consolidation. Where uncertainty can be removed from the law it is simple justice to remove it. Where illegal mergers can be prevented at the outset, they should be prevented. If lawful consolidations and combinations could be freed from the

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4. Mr. Justice Brandeis dissenting in *American Column & Lumber Co., et al. v. U. S.* (1921), 257 U. S. 377, 419.

5. See *Annual Report to Congress of the Federal Trade Commission for the year to June 1930*, at page 51. "No official record is maintained or is practical to indicate the number of acquisitions, consolidations and mergers effected throughout the country."

fear of illegality at any stage of their progress, it seems to me it would lend a greater security to the legitimate growth and conduct of sound business.

The good faith of big business in its effort to comply with the law is best evidenced by the many requests for preliminary approval which have been submitted to the Attorneys General in recent years only to be met with the response that there is no provision in existing law authorizing such procedure. In some instances the Attorney General has given assurance that from the facts presented he saw no need to proceed immediately against the proponents of the plan.[6]

So much for that part of our Anti-Trust Laws which relates to mergers, and now we approach a consideration of the second large domain in which these laws operate.

The Trade Association as an Economic Factor

May I suggest that current discussion has failed to give due regard to the opportunities that are open to trade associations under existing law. It is estimated that there are approximately 14,000 of these trade groups in the country. Some of them have memberships running into thousands. Conservatively, if we are to assume that the average membership is one hundred, those fourteen thousand trade associations represent close to a million and a half merchants. They constitute the backbone of the nation's business.

Those groups of men, representative of every shade of industry throughout the land, are undoubtedly best qualified to solve their own business problems. What may be applicable to one phase of industry will not apply to another. What may be helpful to one kind of business may be harmful to another. It is the men who live with that business who know their industry best.

Measures and remedies which will accord to these groups a freer hand, a greater measure of freedom in cooperation, to study and to solve their own peculiar problems, should be encouraged by the law. We shall have occasion as we proceed, perhaps, to indicate a little more definitely just what direction those measures might take insofar as our Anti-Trust Laws may be of help in speeding business recovery.

Trade Associations and the Law

It is obvious that any laws regulating the conduct of these multitudes must of necessity be general in character. The framers of the original Anti-Trust Act, realizing this difficulty, wrote the law, in what may properly be described as broad, general language. The necessity for that type of a law at that time is obvious. In its operation and enforcement, however, the law has by slow degrees been particularized. The more obnoxious forms of Anti-Trust violation have presented little difficulty. When a group indulged in a boycott of a competitor with the intention of destroying him and his business there was never any doubt as to the illegality of such a course, and that is applicable, too, to the various forms of unfair competition and oppressive tactics well known to the common law before the enactment of the Anti-Trust Statutes.

When we came to the question of whether a trade association group is to be permitted to indulge in price fixing on a reasonable basis, or to divide the market among themselves, or exchange information as to prices, under some open price plan, or standardize their commodity, there was decided difference of opinion. From time to time important cases have arisen which have settled these questions one by one with clarity and precision. And, so, it was held in the Potteries case that price fixing by a group, however reasonable the price, is illegal and violative of law, and so is an allocation and division of territory among its members.[7] Standardization of a commodity by the group is entirely legal.

Now, the question is, shall we amend our laws so as to permit reasonable prices to be fixed by the group? Shall we amend our laws so as to permit agreements to curtail production among the group? In what other respects, if any, can we facilitate the activity of the group by amendment of our Anti-Trust Laws?

Overproduction and Price Fixing by the Group

That leads us to the basic and all important question of the day in industry,—the problem of overproduction. If you visualize a huge machine reaching across the country, continually improved in its productive facilities through the medium of patents and inventions, always reducing thereby the quantum of manual labor required, pouring forth ever increasing volumes of merchandise, you will have somewhat of a picture of the progress of manufacture and industry generally during the past decade.

So long as the rest of the world, depleted of men and capacity through the war period, was slowly being rebuilt, an available market was presented for the consumption of surplus merchandise.

Now, if you have a conception of this huge machine that I have pictured, with its outpouring of merchandise, and then visualize these foreign markets rebuilding themselves and reducing their own demands from abroad, while our local markets are contracting, and in addition to that you see erected price barriers either by artificial price fixing or by the medium of high tariffs, you are very much apt to see too, the damming up of the flow of merchandise and the accumulation of commodities to a point where the market is glutted and industry cannot operate on a profitable basis. It seems to me that any further attempt at this time to encourage artificial barriers by permitting trade associations to indulge in price fixing would certainly tend to reduce consumption; that on the contrary, we should make every effort to permit the free flow of merchandise and trust to a larger consumption.

Throughout this discussion of economic conditions, you hear a strange note sounded by the bankers and those who are observing the financial end of the economic structure. Mr. Paul Warburg announces that the evil of the day is to be found in artificial price barriers erected either through tariff walls or by price maintenance schemes; and Mr. Albert Wiggin declares in the same tenor that price

6. *Address of Attorney General William D. Mitchell* at the annual meeting of the American Bar Association, Memphis, Tennessee, October 25, 1929.

7. *U. S. v. Trenton Potteries Co. et al.*, 273 U. S. 392 (1927).

barriers maintained by trade combinations, tariffs and similar artifices are a hindrance to a speedier business recovery.[8]

These laws, as you will undoubtedly observe, reach right into the heart of the business of the country. They cannot and should not be lightly tinkered with. What seems at first blush as the right remedy, and an easy cure, may prove to clog up the machine further, and to prevent its easy functioning.

Curtailment of Production and the Law

The problem of curtailment of production presents quite a different situation. Shall we slow up this huge machine? Shall we permit, in other words, these millions of men, banded into associations to make definite agreements to curtail the output of their merchandise?

How far does existing law guard against the menace of overproduction? What activities may trade associations pursue under the decisions which will avoid drugging the market with goods? It is no exaggeration to say that by and large, merchants are not aware that existing law accords to their trade associations every opportunity for determining the state of the market with respect to production and with respect to many of the details relating to production. We cannot emphasize too strongly that trade associations generally have not availed themselves of those facilities.

First, as to the volume of production. It is proper for the members of a trade association to report to their central agency the volume of production and the capacity of their output. That information may be tabulated by the central agency and may be disseminated among the members, so that each of the members can at all times, under existing law, keep himself fully informed as to the quantity produced by his group in the industry and the respective capacities of its members.

The members may report their stocks on hand at any given period, and that information may be generally disseminated.

The members may in turn report to their central agency the cost of their product so that each member is not only aware of the quantity produced by the group, but may also check up his own cost to see whether or not he is wasteful in production cost.

And the members may under existing law report to the central agency and to each other the actual prices which their commodities have brought in past transactions. The better opinion seems to be that the members may report the unfilled orders on hand and exchange that information among themselves.

The inhibitions of the law are against agreements which fix a given price or agreements which curtail production. Our Supreme Court even goes so far as to recognize that the dissemination of all of this information will have an inevitable tendency to regulate production and to stabilize prices. Indeed, that information is allowed to be disseminated among the members for the very purpose of permitting enlightened individual freedom of action both with regard to price and with regard to production. The law makes no objection to the fullest education of each member in his own industry so that he can intelligently determine what his quantum of production may be, or what his price should be. Our law goes so far as to permit discussions on these subjects of cost and of quantity of production at open meetings.[9]

There is a vital distinction between these permiserable activities and an agreement among the membership to maintain a certain price or to curtail production.

Too many of our trade associations are ignoring these privileges under the law. Their members, either unaware of their rights under the law, or fearful that the exercise of those rights may be misconstrued by an overzealous prosecuting officer, have been exceedingly slow to avail themselves of these opportunities for knowledge which will aid in their intelligent conduct of their respective business.

Mr. John Lord O'Brian, the assistant to the Attorney General and head of the Anti-Trust Division of the Department of Justice, has declared, in a recent address, as follows:

> "Every experienced lawyer knows how much Trade Associations have contributed and are contributing to the development of a sound public opinion in the special fields of industry. No one understands this better than the law officers of the Department of Justice, and I can assure you that that Department is not in the slightest degree hostile to the proper activities and healthy growth of Trade Associations."[10]

At the same time Mr. O'Brian emphasized that he has no alternative but to enforce the law as it stands, as indeed he must.

If each member of his trade group were to keep himself fully informed as to the condition of the market, as to whether or not it has been overproduced, it is my belief that the menace of overproduction in industry would be considerably alleviated. The difficulty with the existing situation is not so much in the law as it is in the fact that the members of these trade associations for years were grinding out merchandise without knowledge of the essential facts relating to production in their own industry.

The Federal Trade Commission, after a survey of Trade Associations, reports:

> "Dissemination of statistics on produciton and sales, unfilled orders, orders on hand, etc., has, in itself resulted in curtailment of output at certain times. For example, if a manufacturer receiving such statistics covering a representative portion of the industry in which he is engaged, notes that production in the industry is exceeding the demand for the industry's product, resulting in increasing stock on hand, he will, in all likelihood, decrease his output to a certain extent. Other manufacturers in the industry may do likewise and production in general may be curtailed until such time as the statistics show orders increasing and stocks on hand diminished. This is, at least, a natural result of the statistical exchange. Statistical exchange has doubtless often operated to check the addition of new producing units or the replacement of units abandoned through necessity. In some instances curtailment has been made necessary by outside forces, such as insistence by bankers for credit reasons."[11]

8. (a) *Address by Paul M. Warburg, Chairman, The Manhattan Company*, at joint meeting of the Board of Directors, January 8, 1931.
(b) *Report of the Chairman of the Governing Board, Chase National Bank*, Jan. 13, 1931.

9. *Maple Flooring Manufacturers Association et al v. United States*, 268 U. S. 563 (1925). Opinion by Mr. Justice Stone.
See Benjamin S. Kirsh, *Trade Associations, The Legal Aspects*, Chapt. II, Trade Association Statistics.

10. *Address by the Honorable John Lord O'Brian*, delivered before the U. S. Chamber of Commerce, at Washington, D. C., May 1, 1930.

11. *Report on Open Price Trade Associations*, by the Federal Trade Commission in response to Senate Resolution, 1929, pages 279-280.

Proposed Amendments in Relation to Overproduction and the Trade Association

Now in what way can we amend our laws so as to afford a greater facility for the work of these innumerable trade associations scattered as they are throughout the country?

In the first place, we are averse to having too much government in business, and in the second place it must be admitted that those who are engaged in a given business know their own business best. They know their own peculiar problems and they are most apt to know their ailments and their remedies.

Take, for instance, the oil industry. One of the causes for oversupply and overproduction is to be found in the fact that where there are two adjoining oil operators in a pool, each finds it necessary to extract that oil as soon as possible for fear that the other operator will get more than his fair share. They have been clamoring for what is known as unit operation in a pool.

Consider the cotton textile industry. For years it has been what is known as a sick industry, with the market tremendously glutted. We find them still working women and children in night work in cotton mills in the South.

Examine the bituminous coal industry. That presents seasonal difficulties. It is impossible to tell in advance how long the frost is going to last and how far South it is going to reach; what extraordinary or unusual demand may be made at any time, and so mine owners have increased their capacity to enormous proportions to be able to meet seasonal demands. That increased capacity represents increased capital—that capital must return a dividend and so in turn the machine is kept grinding even when there is no demand or when the demand has subsided. In recent years coal has met with keen competition from fuel oil, natural gas and water power.

On the other hand, you take an industry like rayon. That is one business where they cannot keep up with the demand. The production of rayon in the world has risen continually, yet overproduction can scarcely be said to be a problem there.

In other words each industry has its own peculiar problems relating to production and there must be that flexibility in the law which will permit groups in industry to devise ways and means by which some cooperative action will be assured to solve their own special problems. Since it seems that most of these problems converge on the subject of production, wouldn't it be wise to have a central government agency that will be authorized to pass upon and to receive a submission from a trade group or a trade association, of a production plan or program, worked out by the members of that industry—that governmental agency to be authorized, in appropriate cases, warranted by the facts, after a thorough investigation, to approve or disapprove production programs or production plans, and this always subject to court review?

Caution should be taken to circumscribe the authority of this agency so that it should in all respects function in accordance and in compliance with our Anti-Trust Laws, as they stand and as amended, in relation to production programs or production plans. The agency should be given the power in specific cases to permit agreements by a group to operate according to a certain production plan even if curtailment or regulation of the quantum of production in the industry thereby results.

No such power is today vested in any board or any governmental agency. Attorney General Mitchell has declared that he has no alternative but to enforce our Anti-Trust Laws and that agreements to curtail production are violative of those laws.[12]

A suggestion has been made by several eminent authorities that our natural resource industries be exempted from the operation of our Anti-Trust Laws so that they may adequately regulate their production as a conservation measure. That would apply to oil, coal, minerals and similar industries. But the difficulty of overproduction does not stop with our natural resource industries. It is characteristic of a great many other industries throughout the country. It does not require repeal of our Anti-Trust Laws or their nullification to permit industries generally, where the facts warrant, to regulate their production.

Of course, in all measures for curtailment of production, the problem is not as simple as it seems. In the first place, unless agreements for curtailment of production are closely supervised, they are very much apt to aggravate our unemployment situation. Secondly, they bear a close relation to price control and in times of underproduction may become oppressive. In the third place, as merchants have pointed out, there is no certainty or assurance that all the members of a trade group will enter into or observe agreements for curtailment of production. Those present problems peculiar to each specific industry. What may apply to one trade association may not apply to another. The Governmental Agency vested with discretion in the matter of permitting production programs could guard against abuses of one form or another.

We are not without precedent in this regard. Similar measures have been in force in our export trade, in our shipping trade and in the marketing of agricultural, dairy and live stock products, where trade groups have been permitted to work out their difficulties, and if they have not cured the evils complained of they have in some instances, at least alleviated the situation.[13]

Conclusions

(1) Under the existing law there is no adequate machinery for the gathering of reliable data or information concerning mergers and consolidations in industry. The subject is of sufficiently far reaching consequence, particularly because of its recent history to warrant careful study based upon

12. Letter of the Attorney General, March 29, 1929, to the Secretary of the Interior as chairman of the Federal Oil Conservation Board in response to an inquiry concerning approval of plans of crude oil producers to curtail production.

13. (a) *Webb Export Trade Act* [Act of April 10, 1918, 15 U. S. C. 61-65].

Compare *Annual Report to Congress of the Federal Trade Commission for year ended June 30, 1930*, pp. 125, 129:

"At the close of the fiscal year ending June 30, 1930, 57 export associations were filing papers with this office under the Webb-Pomerene law.

"These groups represent producers, mills, mines, and factories scattered throughout all parts of the Union. . . . A tendency toward market stabilization makes for better prices as a whole, a more steady volume of business, and a more uniform movement of products. These advantages in export trade have been summed up by one of the older associations as follows: 'Continued operation under this

reliable data gathered by a responsible governmental agency. We therefore favor: That all mergers and consolidations above a minimum specified capitalization be reported to the government in fullest detail.

(2) To guard against indiscriminate and illegal mergers, to aid members of the bar in advising clinics, to make for clarity and certainty in the operation and enforcement of these fundamental laws, they should be amended so that a merger and consolidation program may be submitted to a central Governmental Agency for its approval or disapproval in advance, reserving in the Government always the right to proceed by injunction to curb abuse or misuse of the merger powers acquired, where those powers have been abused subsequent to the original set-up and in the conduct of the business of the merger.

(3) Let our Anti-Trust Laws be amended so as to vest in either the same or existing or newly constituted Federal Agency the power to approve or disapprove any production plan or program for trade association activity, having power where the facts warrant to permit regulation or curtailment of production in an industry; such a Board to function entirely in accord with the requirements of our Anti-Trust Laws as thus amended, and always subject to court review.

(4) Finally it may be advisable to consider a method of licensing Trade Association groups, the license to be optional and revocable and to carry with it an immunity from the criminal and treble damage features of the law, provided there is at all times full disclosure of activities to the Government. Such a measure may well serve to promote freedom of discussion and freedom of lawful action among the members with relation to the many vexing problems confronting industry today. The Government, having possession of the facts, could always proceed by civil process to secure injunction or revoke the license where the privileges have been abused or where the conduct is violative of the laws as they stand. It is undoubtedly true that many members of trade groups are fearful of open and proper discussion or even lawful or permissible joint action by reason of the conspiracy provisions of the laws.

None of these proposals seeks to inject the government any further into the domain of private business. On the contrary the first aims to secure reliable information on a major factor in industry; the second aims to release the rigor of the present law and remove one element of uncertainty often complained of; the third removes the restraint of the law which prevents needed regulation of production; and the last proposal would enable men in industry to have full, free and open discussion concerning their own business among their own groups, within the law, without the hazard of criminal punishment therefor.

plan has a cumulative effect which we have found very beneficial as years go by.'"

(b) *Shipping Act, 1916* [46 U. S. C. 814, 815] Sect. 15. Compare *Annual Report of the U. S. Shipping Board,* Bureau of Regulation, for year ended June 30, 1930, page 24.

"Four hundred and twenty-four copies or memoranda of new agreements and of modifications of existing agreements filed with the bureau for the board's approval were analyzed and passed upon in connection with the lawfulness of their provisions under the various regulatory sections of the Shipping Act. These agreements and modifications in most instances projected extensive plans for cooperative relationship between carriers fixing rates or fares, regulating competition, pooling or apportioning earnings or traffic, allotting ports, and other matters as to which section 15 requires board approval before being carried into effect. Numerous interviews were had in the bureau's offices with attorneys and other representatives of carriers relative to many of the documents filed under this section, which as originally presented contained provisions objectionable or questionable under one or more of the regulatory sections of the statute. . . . The details of the agreements . . . in the main unmistakably reflect more closely studied and well directed efforts by the carriers to stabilize rate and traffic conditions. . . . The total number of all approved agreements on file as of June 30, 1930, is 1,478, of which 172 are conference agreements."

(c) *Capper Volstead Act,* [Act of Feb. 18, 1922, 7 U. S. C. 291, 292].

The Cooperative Marketing Act [Act of July 21, 1926, 7 U. S. C. 451 to 457]

PREVENTION RATHER THAN PUNISHMENT FOR CRIMES

BY HON. STEPHEN H. ALLEN
Former Member of the Kansas Supreme Court

I WISH to confer through the columns of the JOURNAL with my brethren of the Bar about the crimes problem. If any excuse for doing so is needed, the facts that thousands of acts, some of them moral and some immoral, have, during the life of the Republic, been made crimes by Federal Statutes, and thousands of others by the laws of the states; that our scheme for dealing with them is one that has come down to us from the dark ages and is archaic and inefficient, and that the public is and long has been keenly alive to the unsatisfactory results of our dealings with criminals, seem to me sufficient reasons for discussing it.

It appears to me that we begin our work at about the place where little ought to be required, and end it nowhere. We wander around in a wilderness of inconsequential, half-hearted efforts to suppress crime in ways that long experience proves it cannot be done.

If the ordinary good citizen be asked, "What criminal laws are on the statute books that you are liable to violate?" he is likely to say, "Not any; I am a law-abiding citizen." But if the same question be asked the learned lawyer with whom he sometimes consults, a very different answer will be given. He will say, "I don't know." We all violate some criminal laws sometimes, and some of us many of them many times. The ones most frequently violated are the Sunday laws that scarce anybody now observes in their entirety, the assessment and taxation laws, that invite perjury and penalize the comfortably well-off citizen for telling the truth, the automobile and road laws, some of which are antiquated or too inconvenient to be obeyed all the time,

the gaming laws which may even hit the church that has a pious gift enterprise, or the militant prohibitory law, that makes many acts crimes that some good people regard as innocent and the doing of them within every mans' natural rights.

If you will think these over carefully, you are not likely to have any difficulty in convicting yourself of some crimes, and convincing yourself that your neighbors are no better. Applying statutory definitions, we find that all of us that amount to anything are unconvicted criminals, and that there is no criminal class to segregate from the social mass.

What does society do or try to do?

Catch and punish criminals. Does it catch them? Yes, as to a very small part of them; no, as to the great mass of others. Why are not more of them caught? First, because there is no desire among prosecuting officers to prosecute good citizens who only violate old laws for which they have no respect, second, because they cannot catch others they wish to prosecute, third, because of a variety of human impulses and weaknesses that cause officers and citizens to do nothing and say nothing about those offenses that they think may as well be forgotten.

Manifestly no officer who attempted the impossible task of prosecuting all of us who violate some statute could be elected to any office or even live in the average community.

What do we do to those we catch? Confine them, feed and clothe them during a fixed period, school the most resolute of them in methods of committing crime and escaping punishment, and then turn them loose to return to their old criminal associates or find new ones with whom to renew their criminal activities in a hostile world.

The state cannot and does not wish to punish all criminals. We do not belong in jail, and have no desire to be put there. But there are bad people who must be restrained. Who are they? This is a large question, not susceptible of a complete answer from me.

Whoever they are and whatever their characters, they came into the world by no act and with no knowledge or consent of theirs. Equally so they pass through the years of complete dependence to the time when a conscious will develops. Even from then on their activities will be largely dependent on their environments. Is this where the responsibility of society begins? Soberly and earnestly it is nearer where it should end safely. If there are grave responsibilities resting on society they are, first, that of preventing the propagation of children by imbeciles and defectives, by those who are clearly incapable of bearing healthy offspring, second, the care of neglected, helpless infants during their development. It is from such as these that most of the irresponsible and morally weak develop; many of them to become what we term real criminals.

Here we arrive at the stage that shows how archaic our criminal laws are. Instead of sterilizing the harmful and imperfect germs, we have left them to scatter under the impulses of passion and devoid of reasoning restraint. Instead of strengthening the pliable tender sprouts, we have heaped obstructing rubbish on them. We have made no systematic effort to prevent crime or the propagation of the development of criminals.

There are ample statistics showing the numbers of youths and adults in penal institutions, the acts for which they have been sentenced, the terms of their punishment and the cost of keeping them. These are useful, but as aids to a solution of the problem under consideration begin nowhere and lead to no definite result. If it is to be dealt with as though it were a new one, the first thing the state must do is open its eyes to the facts as they are. How many imbeciles or seriously defective children there are, one or both of whose parents were similar defectives, I do not know, nor has the state attempted to gather the information for me. But I do know families of prolific breeders who have gone on giving birth to imbeciles and defectives from generation to generation. These became either criminals or helpless public charges. A census of all such and of homeless and neglected children could easily be made in connection with state or national censuses with but negligible added expense. But, you ask, how ascertain those of well defined criminal tendencies? From the homes and the schools. Children are both the keenest observers and the best judges of character and capacity that we know of. Their associations are closest, giving them the best opportunities for knowing, their impressions are the most vivid and their judgments most unbiased. In school, on play-ground and wherever else they meet, they have ample opportunity and abundant incentive to know the characters and capacities of their playmates. Little school children have pointed out to me offspring of highly respected parents having decided criminal inclinations, who in later years committed serious crimes of the kinds forecast.

Reformation of character is an individual, far more than a class, problem. Each person is to be dealt with on the basis of his personal character and capacity. These should be shown in the census as well as is possible.

Having such a census, what use can be made of it? The state cannot prevent the birth of every defective, but it can prevent those persons who are clearly defectives from breeding. In the present state of the science of surgery this can be done not only without injury but with positive benefit to those operated on. The expense of such operations on all requiring them would be negligible. The relief from the burden of caring for defective progeny would be very noticeable. All children born into the world must be disposed of or cared for in some way. The ancient Greeks exposed their defectives and let them die. Modern society is too tender-hearted for this, however good the effects might be. Fortunately there is now no occasion for any exhibition of public heartlessness.

Doubtless a large majority of the neglected children needing public care are the offspring of parents classed as normal. All children who are a public charge have precisely the same needs that those having loving parents do. Food, clothing and shelter they must have, but, if criminal tendencies are to be prevented, they must have moral training, useful activities and loving care. Any place that will give them these in full measure is a fit place for them. None other is. Perhaps large institutions of this kind are possible, but I know of no full sub-

stitute for a good private home. There are millions of childless, good people hungering for the love of little children. Cannot the state have adequate agencies to place the children where they will develop under loving influences? The essence of all welfare work is in the improvement physically, mentally and morally of developing human beings. The measure of possible success is greatest with the very young and pliable, diminishing in maturity and ceasing with settled hardness. Of all the responsibilities resting on organized society that of caring for dependent infants is the greatest and most imperative.

The opportunity of the state to do its most efficient and valuable work is past when the child reaches the age of accountability, yet here is where it begins. It then professes to have four main purposes in its dealings with criminals.

1. Protection of society from the repetition of criminal acts by convicts.

2. Punishment inflicted on criminals for their evil deeds.

3. Prevention of crimes by others through fear of like punishment.

4. Reformation of the criminals.

The state starts its protection of society after criminal inclinations have resulted in actual crimes. It then either kills or confines its subject. When it kills it gives permanent relief from the activities of the dead one, but does so at the awful expense of forcing one of its citizens to become a destroyer of human life, an executioner. Worse even than this, the state expresses its hatred of crime by taking human life, as a compensation for the evil done.

If society is protected by confinement of the criminal, the protection ends with the term of confinement, to be followed in a large percentage of instances by increased criminal activity and efficiency.

Punishment pure and simple is merely a manifestation of public hatred, from which the generation of evil impulses is the most natural result.

The fear of like punishment may deter the timid, but the average criminal relies on his ability to escape detection, and pays little heed to, even if he knows about, the punishments inflicted on others.

Reformation of convicts is an altogether worthy object, but the state starts its work only after criminality has developed and sets a limit to its helpful efforts at the beginning of the term rather than when the convict is reformed. Liberty for him depends only on the flight of time, not on acquired habits, purposes or opportunities for a useful life.

Is this the best that modern civilization can do for its perverts and defectives?

Stern restraint is needed for the hardened criminal, not for a time definitely limited at the start, with facilities for schooling in crime, but until he is fitted to become a good citizen, no matter how little or how much time that may take. The law should recognize no right ever to return to a life of crime. It may be relentless, holding out no hope of liberty as an enemy of society, but at the same time it may be kind and helpful. I am not discussing the treatment of petty one-time offenders, punishable merely by fine or brief restraint, but of persons of warped morals requiring discipline. Their reformation is no easy task. It demands the exercise of infinite patience, firmness and kindness. Segregation rather than aggregation of such persons appears to me desirable, but if they must be collected in great institutions, Superintendent J. W. Williamson of the Mississippi Penitentiary, who entertained the Commissioners on Uniform State Laws in 1929 with a 'possum barbecue served by the convicts, is a good specimen of the type required, and his success in the cotton fields is worthy of study and emulation.

Governors are now vested with the pardoning power, often without restraint. In the nature of things they cannot have, and ought not to have, such personal contact with convicts as is required to judge character wisely. A system that opens its doors and lets out only persons worthy to be citizens, would call for services of the highest order the state could command. Yet it cannot be doubted that far better methods of determining the characters and purposes of convicts asking release can be devised than the prevailing haphazard pardoning system, which often causes the grossest scandals.

It would seem that any board or tribunal vested with authority to grant or withhold liberty to prisoners should include in its membership some of the persons who have been closely associated with the applicants for discharge, and that the other members should be the best available judges of character and capacity, without regard to their professions or occupations, with comprehensive knowledge of men and things, of human powers and capacities, rather than mere expertness in some narrow line. The practicability of the whole scheme of reformation would depend on the efficiency of the tribunal vested with power to determine whether the necessary reformation had taken place.

Under the system proposed continued confinement would depend on ascertained bad character, rather than on a single criminal act, and final discharge on fitness to return to society as a trustworthy citizen.

The Morrison Lectures in California

OUR attention has been called to the fact that Dean Pound's address on "Cooperation in Enforcement of Law" in the January JOURNAL is the first of a series of annual lectures to be given under the auspices of the State Bar of California. The expense of the lectures and of publication of same are to be paid out of the income from a trust fund known as the "Alexander F. Morrison Trust." Mr. Morrison, now deceased, was for many years a respected member of the San Francisco Bar, and the trust was created by his widow and by former members of the firm of which he was the founder and head. The second of the series of lectures will be delivered at the fourth annual meeting of the State Bar of California in October of the present year. The speaker has not yet been announced.

CURRENT LEGAL LITERATURE

A Department Devoted to Recent Books in Law and Neighboring Fields and to Brief Mention of Interesting and Significant Contributions Appearing in the Current Legal Periodicals

Among Recent Books

THE PATH TO PEACE, by Nicholas Murray Butler. New York: Charles Scribner's Sons. 1930. Pp. xiii, 301.—The years since the Great War have produced a profound change in men's minds. A multitude of influences have been at work creating the feeling that of all the foolish and criminal proceedings surely war is incomparably the most foolish and the most criminal. Millions of men today, not professional soldiers but citizens who were diverted from their peaceful avocations by the call of war, know what the hateful thing really is. Memoirs, trench records, plays, poems, novels,—in this recrudescence of war literature there is, without any conscious intention, a vast peace movement. Mankind, with all the progress of the centuries, cannot remain mentally in the stage of the schoolboy whose only idea is to get his fists up first.

Here, in President Butler's brief but weighty and high-minded book, there is the utterance of the philosopher who, not content with analyzing the causes of war, is bent upon its cure. The book will not be palatable reading for those who play politics. No voice in the United States carries further than that of the President of Columbia University, and one main feature of the book is the way in which it deplores the paralysis that has come over the statesmanship of the United States in the years since the war ended and the utterly important business of reconstructing a smitten world began. This book, so straightforward in its thinking, so downright in its conclusions, so uncompromising in its apportionment of praise and blame, so terse, so free from any suspicion of oratory, should be spread broadcast. Governmental theory can be a dull subject, but theories of government, handled by one who has lived in the very center of every governmental issue of this generation, have all the interest of a personal record.

The causes of war, as Dr. Butler points out, are implicit in the very conception of nationalism. Since the breakup of the Roman Empire and the growth of separate states nationalism has built itself on the three ideas of ethnic unity, geographical unity, and economic independence. But out of the desire for ethnic unity has grown the question of minorities, out of the quest for geographic unity have come policies of aggression and wars of conquest, out of the desire for economic independence have sprung tariff systems which are the main causes of unrest in a world becoming increasingly commercial. Obviously, as the material resources of the world increase, war will become more and more frightful, until civilization will sink under the pressure of its own capacities for destruction. If there is to be any future for mankind there must be the renunciation of war as an instrument of national policy, and in its place there must come the establishment of an international court which will carry the respect of the whole world. President Butler is not under any illusions as to the possibilities of war even when such a court has been established. To prepare for war is practically to ensure war, the military mind being what it is; and there never was a war in which the power that took the initiative did not declare that it was acting in self defence. The word Aggression has to be defined. As things are, the nation that is in the position to make the first jump has the advantage and a premium is put upon the activity of the militarist. Dr. Butler defines aggression as "an act in defiance of the will or against the interest of another government or people, without first submitting the issue to the impartial examination of a competent authority to determine what the facts may be and what are the equities involved." This, of course, implies an international court to which such issues can immediately be referred, a Paramount Court of International Justice made yet stronger than the present Court by the enthusiastic adherence of the great powers. The world is now become so small that a position of isolation is no longer possible for any power. If, however, war should break out in spite of the pacific efforts of such a court, the neutral nations must supply no munitions of war to the aggressor nation. The area of the struggle would at once be limited and the offending nation would at once feel it was outlawed from the comity of peoples.

This fine book is lit up all through with personal passages of extraordinary interest. The incalculable results of the personal dislike existing between President Wilson and Senator Lodge, the unfortunate effect of the translation of "La Société des Nations" as "League of Nations" with all the military associations of the word "League"—why not "The Associated Nations"?—the intimate notes on Briand, Stresemann, and Chamberlain, and especially on the Kaiser Wilhelm, add immensely to the interest of a book which, in its main thesis as to the possibility of ending war, deals with the most vital problem now before a distracted world. The reviewer as he writes these lines is sitting within sight of the frontier between France and Italy. The mountain sides are scored with the new military roads, every hill top has its fort. For three hundred years and more France has had reason to fear for its frontier, and the tragic experience of a people is not to be set aside in a day when it is faced with the problem of a reawakened Italy. But what a prospect is being opened up of future trouble! What waste on both sides of men and material, what distraction from the finer possibilities of life! And all this because mankind that can measure the stars and see the invisible has allowed itself to be obsessed by the idea that the only way of settling differences of view is the re-

sort to force. It is high time that the leaders of youth kept pointing the eyes of the younger generation to the "Path of Peace."

R. BRUCE TAYLOR.
Ex-Principal of Queen's University, Kingston, Canada.

The Encyclopaedia of the Social Sciences, Volume I. New York: The Macmillan Co. 1930. Pp. xxvii, 646.—No intelligent person will question the need of a genuine encyclopaedia of the so called social sciences. This country has never had such an instrumentality or aid to popular culture and knowledge. The monumental work now in progress under the editorial direction of Prof. Edwin R. A. Seligman and his competent and scholarly assistants will assuredly supply a widely felt need—to use a terribly hackneyed but unavoidable expression.

Two questions suggest themselves as one opens the first volume of an encyclopaedia: Will it be adequate, and will it be progressive? Science is dynamic, not static, and especially dynamic are the inexact and largely empirical social sciences—politics, economics, ethics, sociology, etc. The point of view, the *weltanschauung,* of contributors to a cyclopaedia is all-important.

It may be stated at once that the contributors to the volume of encyclopaedia before us take what may be called the liberal and progressive view of the intricate and difficult problems within their field. There is no dogmatism in any of the articles and items. The point of view is not Marxian, nor Fabian, nor Manchesterian. It is never Fundamentalist. The spirit of the age, the spirit of inquiry, open-mindedness and pragmatism pervades the volume.

Not a few of the contributors are known as advanced thinkers, as radicals even. They exhibit at times the defects of their admirable qualities. Some of the items are treated rather superficially and possess little value. But the standard, as a rule, is high and worthy of the great enterprise.

The first half of the volume is introductory and exceedingly illuminating and informing. In no fewer than twenty-three separate articles as many writers trace the development of social thought and social institutions since the ancient Greeks and Romans, define and describe the social sciences, analyze such movements as revolutions, nationalism, internationalism, individualism, capitalism and liberalism, and set forth the effects of war on social reorientation. The second part of the elaborate introduction deals with the evolution and state of the "social sciences as disciplines" in the several parts of the civilized world.

The articles proper begin with "Aar" and end with "All." The legal profession will be particularly interested, of course, in such articles as agency, alien and sedition acts, alimony, alien property, allegiance, etc.

The editor speaks frankly of the "welter and confusion of modern thought," and of the need of authoritative knowledge for the creation of a sounder public opinion. Many of the articles, and especially those in the introduction, will undoubtedly promote sound and tolerant thinking, but it cannot be said that the treatment of the few "burning questions" dealt with in the present volume is as firm and helpful as it might be. For example, the article on the regulation of the liquor traffic is about as satisfactory as the Wickersham report. The article on advertising is commendably candid, but scarcely adequate or up to date. The same is true of a number of other articles—they are acceptable as far as they go, but one feels that the writers had too little space for the proper treatment of their respective subjects.

Prof. Charles A. Beard, a profound thinker, discusses individualism and capitalism with ability and mastery, but he assumes more knowledge in the average reader than the latter can boast of and is rather too technical in some of his paragraphs. He makes, by the way, one strange slip. He calls Bakunin's doctrines "individualistic anarchy," whereas they were identical with Prince Kropotkin's communistic-anarchist teachings, and individualistic anarchy was conceived and developed in this country and never took root in Europe.

The sins of omission and excessive condensation noted in this volume should be avoided in the future. They can be without erring on the side of undue expansion and bulk.

VICTOR S. YARROS.
Chicago.

May It Please the Court. By James M. Beck. New York: The Macmillan Company, 1930. Pp. xx, 490.—Many readers of the JOURNAL have heard James M. Beck in his delightful post-prandial talks. His antiquarian interests, his industry in historical research, his unfailing flair for the selection of those incidents which appeal to lawyers in their hours of ease, combine with a felicity in expression and a charming drollness in delivery to make any address by him to lawyers a tympanum treat.

In the first part of this book are collected nine such addresses, ranging from topics so intrinsically interesting as the celebrated Beaumarchais case, to such jejune subjects as "Washington and the Constitution."

Perhaps the most entertaining of these addresses is Mr. Beck's story of the Christmas revels at Gray's Inn in 1594-5. By way of introduction he paints the picture of the Inns of Court, their history and their functions. He tells of the erudite buffoonery of their Christmas revels or masques, and finally he details the magnificent coronation of the Prince of Purpoole in 1594, and the accompanying festivities. He suggests that Shakespeare's *Comedy of Errors,* which was produced in Gray's Inn on the second night of the revels by the company of players of which Shakespeare was a member, might well have been written expressly for the occasion. He tells of the large public interest aroused by the revels, culminating in the visit of the Queen herself.

In the second portion of the book are contained eight arguments made by Mr. Beck in celebrated controversies. Three of these are speeches in Congress: "The Revolt Against Prohibition," "The Constitutional Power of Congress to Exclude Aliens in Enumeration of the Census for Apportionment," and "The Constitution and the Flexible Tariff."

Another is his argument before the Senate Committee on Privileges and Elections on "The Constitutional Right of the Senate to Exclude a Senator-Elect," made on behalf of Frank L. Smith of Illinois. There are also Mr. Beck's successful arguments in the Northern Securities case and the recent case of *Meyers v. United States,* involving the limitations of the President's power of removal in cases where his power of appointment is fettered by the necessity of securing Senatorial consent.

The book deserves a place in every lawyer's home library. It is interesting to compare it with the col-

lected speeches of Lord Birkenhead published last year, and to recall that Mr. Beck is a fellow member with Lord Birkenhead of Gray's Inn.

WILLARD L. KING.

Chicago.

Statutes and Decisions of the Federal Trade Commission. 1930. Washington: United States Government Printing Office. Pp. 1237. This volume was compiled at the direction of the federal trade commission by Henry Miller, an attorney of its trial staff. The scope of the work is primarily a reproduction of the court decisions decided under the federal trade commission act, and those under sections 2, 3, 7 and 8 of the Clayton Act (sections which contain the important revisions of the anti-trust laws enacted in 1914 which, with section 11 cases, also included, extended the jurisdiction of the commission in their enforcement.) In addition to those cases to which the federal trade commission was a party, the more important state and federal decisions in which private parties instituted proceedings are collected.

The few cases in which the Webb-Pomerene Act of 1918 have been considered by the courts are also noted, including the interesting decision of the supreme court of Washington in American Export Door Corporation vs. John Gauger, 283 Pac. 462.

While all court decisions in which the trade commission was a party from the date of its creation, September 26, 1914, up to the end of the year 1929, are included, the government and private suits under the Sherman anti-trust act are for the most part entirely omitted.

The inter-relationship of the cases under the Sherman act with those under the cognate federal anti-trust statutes, is obvious to all who have any familiarity with this branch of the law. The compilation under review is thus a segment of the greater field of cases relating to federal anti-trust interpretation and enforcement.

A more comprehensive series of cases is included within the ten volumes of the federal anti-trust decisions compiled by the department of justice. The federal trade commission volume under review, together with that department of justice collection, contains practically all the important decisions arising under these statutes. What is missing from both these collections is a series of annotations and notes similar to those noted in the marginal annotations to Professor McLaughlin's collection of "Cases on the Federal Anti-Trust Laws of the United States"[1] and a bibliography of the commentators in this field, such as is contained in the recent publication in German of the review of American cartel literature by Professor William F. Notz of Georgetown University.

However, despite its restricted scope, this compilation serves the valuable purpose of collecting under one cover the cases and court proceedings which were hitherto noted in the back of the official reports of the commission, known as Federal Trade Commission Decisions. Reference to this volume thus can eliminate much weary digest-searching.

The interesting cases already decided by the supreme court and circuit courts of appeal and district courts, indicate the range of judicial reasoning and discussion during a period of fifteen years and make the more regrettable the practice of the federal trade commission in reporting solely the complaint, report, findings as to facts, conclusion and order in those cases in the federal trade commission decisions, without the analytical discussion of the cases that is usual in the review of these proceedings in the federal courts.

BENJAMIN S. KIRSH.

New York City

1. Reviewed by Benjamin S. Kirsh in the September 1930 issue of the *American Bar Association Journal.*

Represión de la Especulación y Trusts: Estudio de la Ley 11,210, con sus Antecedentes Doctrinarios y Legislativos, Jurisprudencia Argentine y Americana. Por Dr. Enrique Gil. Buenos Aires, 1929.—This volume is precisely what its title indicates,—a study of the Argentine Law, 11,210, directed to the suppression of trusts and that form of speculation that was considered injurious to the commonwealth. It is the first of a proposed series of publications written by those connected with the faculty of juridical and social sciences of La Plata, and has for its subject the law passed in 1922 in the Argentine, much like some of those in the United States, intended to meet and correct a situation made more acute by the dislocation of trade during the Great War.

The object of the legislation was the prohibition of all agreements, combinations, etc., looking to monopoly, article 1 declaring criminal, "every convention, pact, combination, amalgamation or fusion of capital tending to establish or sustain a monopoly . . . in one or more branches of production, traffic, by land, river or sea, of commerce, internal or external, in one place or more or throughout the land."

The full text is given and commented on, with comparison with the legislation and decisions in the United States, and in some cases with an account of the debate on its passing.

It is interesting to see our "trusts," " pools," "Gentlemen's agreements," etc., appearing in familiar environment; and the universal "dumping" appears in the Argentine as it does in Geneva. "Ley Sherman" an American will recognize, if "E. U. v. Swift" does look odd.

The book is well printed; but the proof-reading leaves much to be desired, English and Latin especially suffering.

On the whole, however, it is an interesting work for those desirous of seeing how difficulties common to the whole world are met in different countries.

WILLIAM RENWICK RIDDELL.

Osgoode Hall, Toronto.

The Law of Zoning, by James Metzenbaum. New York: Baker Voorhis and Company. 1930. Pp. 569.—The story of this book—for it tells a story and tells it graphically—revolves around *Village of Euclid v. Ambler Realty Company,* 272 U. S. 365, which was argued before the Supreme Court on January 27, 1926, was reargued on October 12, 1926, and was decided on November 22, 1926. The question involved was the constitutionality of the zoning law adopted by the village of Euclid near Cleveland. It was the first case of its kind to come before the United States Supreme Court and was tremendously important for this reason. Prior state decisions had upheld such laws as not being in violation of state constitutions. This case raised the

question whether such laws were valid within the federal constitution. The author devotes 15 pages of the book (pages 108-122) to a highly colorful and interesting description of his participation in this case, including a somewhat facetious colloquy between Chief Justice Taft, Mr. Justice Holmes and the author which took place during the argument, and dealt with the differences between a real estate agent and a realtor. Undoubtedly the author has rendered a very important public service by his participation in this case and is entitled to due credit therefor.

It should not however be overlooked that the author but participated, and that other attorneys (not mentioned in the book, or not mentioned in this connection) also did their share. A brief filed by Alfred Bettman of the Cincinnati bar as amicus curiae, on behalf of the National Conference on City Planning, on re-argument, appears to have had its effect. The book would gain in value if these facts were set out by the author at this place.

The internal structure of the book is vitally affected by the manner in which the author acquired his information. A number of the chapters obviously are recasts if not true reproductions of appellate court briefs. This is strikingly apparent in the chapters on eminent domain and on the police power. Nearly two hundred pages make up the chapter on "forms"; they contain the text of the Ambler case as well as the text of a number of typical zoning ordinances. A reader who is looking for a book which sets forth in logical order the principles applicable to zoning will therefore be largely disappointed.

Yet the book is without a doubt a valuable contribution to the legal literature in this new and largely unexplored field. Though written with a view of helping "municipal, state and federal officials, members of boards of appeal, realtors, planners and to all others who may desire to know of the influences that affect and shape the growth and progress of our cities" (preface) it is of particular interest to lawyers. The fact that it presents rather the raw material for a book than a book itself does not prevent it from being useful. The author's style, though it suffers from minor defects (he has a rather marked tendency to split his infinitives), is generally clear and at times rises to real literary heights. The chapter on state decisions is of particular value to lawyers as it enables them to turn without the loss of a minute of time to the decisions of the particular state in which any particular lawyer is interested.

The reasons which induced the author to write the book are stated by him in the preface as follows: "In the wake of that pronouncement by the highest court of our land, came an ever-increasing number of inquiries and requests. These I faithfully tried to answer and fulfill. But as they grew in number and in frequency, it became apparent that mere correspondence could not cope with the situation. So after some devotion to the subject, I determined to address myself to the task of trying to tell the story of the origin, the evolution, the growth, the decisions concerning, and the final validation of zoning."

CARL ZOLLMANN.

Milwaukee.

The Expert, by Oscar C. Mueller. 1929. Los Angeles: Saturday Night Publishing Company. Pp. 74. This volume expresses an opinion in which a great many serious-minded persons will be most happy to concur. It argues for more careful regulation of the admission of expert testimony in suits at law, and for a higher degree of qualification among expert witnesses than is now presented by gentlemen of this category.

It outlines in detail what has already been accomplished toward this end in one state—California—and should serve to stimulate other states into a serious consideration of what they should and can effect along similar lines, once concerted action is undertaken.

The author cites a number of interesting cases in which experts of various types have been proven mistaken in their conclusions and draws attention to the omnipresent fact that there is none among them not subject to the usual human errors. He argues quite ably for the appointment of an impartial expert by the court (as now obtains in California), indicating at the same time the requisite safeguards which would permit the defense in a criminal action, or both sides in a civil action, to procure additional experts should they feel it necessary.

The only observation which arises readily, is that the author's ideas are not radical enough, and that, under proper regulation, an expert selected by the court should ordinarily be the only one required and his conclusions accepted as final. Before such a happy condition prevails, however, it will be necessary for the whole field of expert testimony to be carefully analyzed and some sort of conditions defined whereby the qualifications of a particular expert with regard to his own specialty may be properly evaluated.

To this end, examining boards should be constituted before which the would-be experts would be required to appear and prove their proficiency before being granted certificates of qualification, without which none should be permitted to testify. And, since professional qualification and integrity do not necessarily go hand in hand, such a certificate should be revocable at any time upon demonstration to the satisfaction of the State Examining Board that its holder has been guilty of unethical practices.

Such conditions are, no doubt, not soon to be realized, and we should meantime be gratified at such progress as has already been made. Let us congratulate California upon her forward step and urge her sister states to follow her praiseworthy example.

Crime Detection Institute,
Northwestern University.

CALVIN GODDARD.

The following letter was received recently from the office of the new *Historical Dictionary of American English*, upon which a considerable staff has been working at the University of Chicago for some time:

"We know here from experience that lawyers watch dictionaries very closely. For example, when Sir William Craigie had finished the word *vaseline* for the Oxford English Dictionary and had defined the word as a common noun, applicable to any commodity containing such and such elements, he was a short time later called upon by a lawyer, representing the firm in America that makes vaseline. This lawyer explained to Sir William that *vaseline* is a trade name, the ex-

clusive property of the concern that makes the product known by that name, and hence is not to be applied indiscriminately to any similar substance or compound.

"The lawyer pointed out to Sir William that if the firm making vaseline allowed this definition to pass unchallenged they would be seriously handicapped in bringing suits for infringements of their rights in the making of commodities similar to vaseline, and perhaps even called vaseline. A Japanese company, it seems, had already begun the making of a similar commodity to which they were giving the name *vaserine*,—a name which in Japanese amounts to the same thing as *vaseline*, as a Japanese prounces our *l* as though it were an *r* anyway.

"Sir William saw the justice of this criticism, and corrected himself on this word *vaseline* by giving the word again in the Preface to the W volume of the OED. These trade names, I may add, are the bane of a lexicographer's existence. If they were always spelled with capitals they could be guarded against better, but they are often not so spelled, and the lexicographer plumps right into one without knowing it. The word *tabloid* comes to my mind in this connection as being that type of word." C. P. M.

Leading Articles from Current Legal Periodicals

Texas Law Review, February (Austin, Tex.)—Contracts for the Benefit of Third Parties in Texas, by Ira P. Hildebrand; The Declaratory Judgment, by C. S. Potts.

Yale Law Journal, February (New Haven, Conn.)—A Strike and Its Legal Consequences—An Examination of the Receivership Precedent for the Labor Injunction, by Walter Nelles; Legal and Institutional Methods Applied to the Debiting of Direct Discounts—II Institutional Method, by Underhill Moore and Gilbert Sussman; Changing Objectives in Legal Education, by Roscoe B. Turner.

West Virginia Law Quarterly, February (Morgantown, W. Va.)—The Declaratory Judgment in the United States, by Edwin M. Borchard; Preferred Stock: Its Authorization by Amendment of the Corporate Charter, by Gurney Edwards; The Present Supreme Court, Social Legislation, and the Judicial Process, by Jeff B. Fordham.

Harvard Law Review, February (Cambridge, Mass.)—Marriage and the Domicil, by Joseph H. Beale, John E. Laughlin, Jr., Randolph H. Guthrie, Daniel M. Sandomire; Regulation of the Contract Motor Carrier under the Constitution, by LaRue Brown and Stuart N. Scott; Collective Labor Agreements in American Law, by William Gorham Rice, Jr.

Commercial Law Journal, March (Chicago)—The Riddle of Governmental Power in the Use of Public Waters, by Ernest C. Carman; Is the Bar Responsible for the Administration of Justice? by Samuel T. Bush.

Marquette Law Review, February (Milwaukee)—What Constitutes a Common Carrier, by Earl N. Cannon; Payment by Check of Insolvent Prior to Bankruptcy, by L. L. Rieselbach; State Liquor Dispensaries as a Solution to the Prohibition Question, by H. William Ihrig.

Tulane Law Review, February (New Orleans, La.)—The French Language and the Louisiana Lawyer, by Sidney L. Herold; The Statutory Presumption, by Paul Brosman; When a Bill or a Note Represents an Usurious Contract in Louisiana, by Robert Weinstein.

Wisconsin Law Review, February (Madison, Wis.)—The "Higher Law" Background of the Law of Eminent Domain, by J. A. C. Grant; The Constitutionality of Wisconsin's Statute Invalidating "Yellow Dog" Contracts, by Donald MacDonald.

Michigan Law Review, February (Ann Arbor, Mich.)—The Initiation of Criminal Prosecutions by Indictment or Information, by Raymond Moley; Some Comments on the Reserved Power to Alter, Amend and Repeal Corporate Charters, by Gustavus Ohlinger; Some Inadequacies in the Law of Arrest, by John Barker Waite.

Notre Dame Lawyer, January (South Bend, Ind.)—Extension of Equity Jurisdiction, by William M. Cain; The "Joint Enterprise" in the Law of Imputed Negligence, by W. D. Rollison; Patentable Inventions, by Eugene C. Knoblock.

The Lawyer and Banker and Central Law Journal, January-February (New Orleans, La.)—Legislatures have no Authority to Grant Powers to the Federal Government; The Interpretation or Construction of Deeds, by Robert F. Norton and Charles C. Clark; Some of the Legal Aspects of the Means Used to Avoid Payment in Disappearance Cases, by Edward J. Jeffries, Jr.; Federal Judges and Juries, by Thomas W. Shelton; Long Term Leases, by Clarence M. Lewis.

North Carolina Law Review, February (Chapel Hill, N. C.)—Trust Administration: Apportionment of Proceeds of Sale of Unproductive Land and of Expenses, by Henry Brandis, Jr.; The Parole Evidence Rule in North Carolina, by James H. Chadbourn and Charles T. McCormick; Purchase Money Resulting Trusts in North Carolina, by J. Glenn Edwards and M. T. Van Hecke; Tax Escape by Manipulations of Holding Company, by M. S. Breckenridge.

United States Law Review, February (New York City)—Suits by States to Abate Nuisances, by George C. Lay; The Judicial Council in California, by Joseph W. Kaufman.

Kentucky Law Journal, January (Lexington, Ky.)—The Right of Privacy Today, by Roy Moreland; The Right of Privacy—A contra View, by Rufus Lisle; Consideration in Mortgages, by Clarence E. Barnes.

Law Quarterly Review, January (Toronto, Canada)—Law and the University, by Benjamin N. Cardozo; Privacy, by Professor P. H. Winfield; Administrative Consultation of the Judiciary, by Professor Carleton Kemp Allen; a Reply, by E. C. S. Wade; Modern Discussions of the Aims and Methods of Legal Science, by J. Walter Jones; Injuries to Trespassers, by William O. Hart.

California Law Review, January (Berkeley, Cal.)—Extraterritorial Powers of the Consular Office, by Julius I. Puente; California and the Uniform Stock Transfer Act, by Homer D. Crotty and Graham L. Sterling, Jr.; Scientific Method and the Law, by Max Radin.

Illinois Law Review, February (Chicago)—The Basis of Corporate Receiverships in Illinois, by Arthur C. Bachrach and John J. Abt; Relief in Equity Against Unfair Trade Practices of Non-Competitors, by James F. Oates, Jr.; The Illinois Cases on Accidental Means Insurance, by Homer H. Cooper.

Illinois Law Review, March (Chicago)—The Social Sciences and the Law Curriculum, by Clarence M. Updegraff; The Use of Water Power in the Generation of Electricity, by Charles B. Elder; Interpretation and Construction of Wills of Immovables in Conflict of Law Cases Involving "Election," by Raymond J. Heilman.

Southern California Law Review, February (Los Angeles, Cal.)—The Law of Discovery in the Courts of California, by Dudley H. Harkelroad; The Current Federal Oil Policy: A Change in the Public Land Policy, by Charles G. Haglund; Responsibilities and Liabilities of the Transfer Agent and Registrar, by Frederick R. Behrends and Sheldon D. Elliott.

Virginia Law Review, February (University, Va.)—Chain Stores and the Courts, by Edward W. Simms; Restrictions on State Taxation Because of Interference with Federal Functions, by Robert C. Brown; Some Legal Aspects of the Governor's Power to Remove Local Officers, by Charles M. Kneier; The Strange Case of Reverend Ernest Lyons Who Falsely Confessed Murder and Suffered Accordingly, by James L. McLemore.

Canadian Bar Review, February (Toronto)—The Divorce Jurisdiction Act, by Horace E. Read; The Doctrine of Hot Pursuit, by J. Stafford H. Beck; Bench and Bar in the Saddle, by G. F. H.; The World Court not a Judicial Body, by Pierre Crabitès; The First Naturalized Canadian, by William Renwick Riddell.

Minnesota Law Review, February (Minneapolis, Minn.)—Preferences in Prereceivership Claims in Equity Receiverships, by Jefferson B. Fordham; The Protection of a Holder of a Warehouse Receipt, by John Hanna.

THE MERCHANT ETHIC

(*Continued from page 228*)

proval of enlightened selfishness of the hard headed type, and somewhat of a echo of Adam Smith's doctrine of the "invisible hand" which guides individual self-seeking into paths of the social good. In reply, it may be frankly said that untold good has unquestionably come from the intelligent pursuit of private interests. In the years ahead of us, business will undoubtedly serve us in still greater degree by what we may call more intelligently selfish standards of proficiency.

If this paper were addressed to persons of the eighteenth century, it probably would close with an exposition of the advantages flowing, as we have seen, from the exercise of diligent self interest in a world of free competition. Something might also be said of the sharp distinction between appeals to benevolence and self interest, with the implication that we cannot rely upon the former and must, for the most part, depend upon the latter.

New Fiduciary Relationships

The world of the twentieth century, however, is a more complex world than that of Adam Smith. We no longer think in terms of the village weaver and candlestick maker, who exchanged their products so informally, but rather in terms of complex commodities, such as multimotored flying machines, anti-knock gasoline, new pharmaceutical products, such as hexylresorcinol and viosterol, and a multitude of others, an intimate knowledge of which is possible for only relatively few. In such a situation, where the public finds it increasingly difficult to distinguish the genuine from the false, the manufacturer and the merchant of professional standards perceive the need of a certain fiduciary relationship between the buyer and the seller. Just as the standards of the honorable physician will restrain him from advising an unnecessary surgical operation, and the morals of the upright lawyer will suppress the selfish instinct to gain a lucrative fee by recommending unwise litigation, so the ethics of the merchant will inhibit his natural impulse to make a profit through the sale of a meretricious or unworthy product. To use a single illustration, he will steadfastly refuse to manufacture and sell a breakfast food said to contain certain vitamins in health giving quantities unless he is convinced that such is the case, regardless of an obvious opportunity to "cash in" on a wave of popular interest in the subject of vitamins.

Thus the merchant ethic is coming to appreciate the significance of these quasi-fiduciary relationships, and to emphasize the breach of fair dealing involved in the taking advantage of the relative ignorance or inferior bargaining power of others. The law, of course, has already thrown a mantle of protection about minors, women, and certain others as well, but, generally speaking, has insisted upon an open field for the exercise of native sagacity and acquired knowledge. It is probably well that it has kept within such limits. The professional spirit, however, imposes its stricter moral control by the voluntary extension of what the law has termed the trust relationship. This may, indeed, be called the new spirit of "noblesse oblige" in business.

At this point, we could easily allow our thoughts to range over the various fields of business, from ships to sealing wax and from furniture to flying machines. In nearly every case, we, as consumers, are dependent upon the integrity of the vendor. If we buy nutmegs, we trust that they will not be made of wood. If we buy life preservers, we trust that they will not be loaded with iron to conceal a deficiency in the content of cork. If we choose to fly, we fervently hope that the plane will have been thoroughly checked for all mechanical faults before we take off. If we are small manufacturers, we trust that our important outlets for our products will not leave us in the lurch, or exercise a strategic situation to beat our prices down to a bankruptcy level. If we are holders of corporate securities, we trust that our company officials will keep faith with us. Fiduciary relations, in short, appear to be the cement which holds together these divergent elements of our economic order.

Since the sobering experience of the stock market debacle of 1929, the world has given new thought to the subject of fiduciary relations with respect to the old subject of speculation. Even legal and judicial attention has been given to a few of the so-called "pool" operations, by the shrewd tricks of which the unsophisticated are again and again separated from their money. Again, the propriety of the use of so-called "inside information" by corporation directors, whereby they may take advantage of their fellow stockholders, is being reconsidered as never before. Leaving abstract theory on this subject, we have all recently read of former Prime Minister Stanley Baldwin proudly losing his fortune by refusing to sell his depreciating shares and thereby deliberately passing his losses on to others. There are probably few among us who would follow so stern an ethic, but we shall not forget that there are those who have.

Apropos of these voluntarily assumed trust relationships, it is exceedingly interesting to observe the spread of the idea into some unusual and possibly unexpected places. We are not accustomed, for example, to find consideration for the injured prominent in the thoughts of the casualty companies, yet we can name companies which pride themselves in affording adequate relief for the unfortunate victims of industry, rather than in attempting to beat down legitimate claims by legal pettifoggery. There is also the rise of a new attitude toward labor, which we find expressed in Mr. Owen D. Young's notable address on the occasion of the dedication of the new business school buildings at Harvard in 1927. After pointing out that labor, no less than capital, shares in the hazards of industry, he used these words:

"Fortunately, we are making great progress in America in these difficult relationships. We are trying to think in terms of human beings. One group of human beings who put their capital in, and another group who put their lives and labor in a common enterprise for mutual advantage. . . .

We think of managers no longer as the partisan attorneys of either group against the other. Rather we have come to consider them trustees of the whole undertaking whose responsibility it is to see to it on the one side that the invested capital is safe and that its return is adequate and continuous; and on the other side that competent and conscientious men are found to do the work and that their job is safe and their earnings adequate and continuous. Managers may not be able to realize that ideal either for capital or labor. It is a great advance, however, for us to have formulated that objective and to be striving toward that goal."

For these considerations, therefore, we would appear to be reasonably justified in naming this solicitude for implied fiduciary relations as a second general element of the merchant ethic, to rank beside the primary element of the strenuous and intelligent pursuit of individual interests. The whole conception of professional standards, moreover, suggests still another element, namely, a concern for the public interest. Of this something remains to be said.

Business and the Public Interest

If it be asserted that business has been slow to adopt the social point of view, we may observe, at the very outset, that the concept has also been one of gradual development in the older professions. An illustration of this may be drawn from the history of the honored medical profession.

The ancient Hippocratic oath, the first code of ethics ever formulated by a professional body, contains the following pledge of secrecy: "Whatsoever, in my practice or not in my practice, I shall see or hear amid the lives of men which ought not to be noised abroad, as to this I will keep silence." This excellent admonition against gossip was virtually repeated in the 1847 Code of the American Medical Association, with the slight modification that matters which it quaintly termed "infirmities of life or character" should never be divulged by the physician "except when he is imperatively required to do so." By 1912, however, public opinion appeared to justify a stronger position. The new code adopted in that year contains the following qualifying sentence: "There are occasions, however, when a physician must determine whether or not his duty to society requires him to take definite action to protect a healthy individual from being infected." The ethical theory implied in this is, of course, that the first and primary duty is simply that to society. In like manner, time will probably produce some marked changes in business attitudes.

We may recognize, however, the quite evident fact that business has made exceedingly rapid progress in its social attitudes within the past few decades. Much of this has already been embodied in legislation, such as the limitation of working hours for women and children, the provision for employer's liability in case of industrial accidents, the whole subject of pure food and drug laws, the "blue sky" laws regulating the sale of securities, the work of the various Federal commissions, and sundry acts and ordinances relating to the safety of buildings, theatres, steamships, and the like. By the aid of these provisions, which enforce a minimum degree of social conduct upon those who might otherwise engage in a quite demoralizing sort of competition, business is unquestionably conducted upon a much higher level today than seemed at all possible at the beginning of the present century.

It would be idle to declare that we have no new worlds to conquer. Life has by no means robbed the business man of opportunities to exert his utmost effort for challenging social ends, and much lies ahead of us. Concerning this, two observations may be made. In the first place, our business order still gives opportunity for some rather obvious merchandising of the anti-social sort. We are all somewhat shocked, for instance, to learn that certain sporting goods dealers in one of our larger cities have been selling Thompson sub-machine guns to the underworld, and even offering to remove the serial numbers for an additional charge. And most of us would probably take exception to the sale of vulgar and demoralizing films, or, again, to efforts to augment the sale of war materials through secret attempts to frustrate international conferences on the limitation of armaments.

On the other hand, however, our business and economic order gives rise to a second group of problems for the solution of which we must go far afield into abstruse realms of trade and financial theory. These new questions relate to the proper control of speculation in goods and securities, to the adjustment of discount rates, to the classification of paper which shall be eligible for rediscount at the Federal Reserve Banks, to the subject of branch banking, to the regulation of installment purchases, to the maintenance of a wage level which will permit the consumption of mass production goods, to the establishment of old age pension systems, to the various phases of economic imperialism, and to such ageold problems as the elimination of poverty. Not a one of these, we may observe, is to be solved by either sentimental or emotional reactions, but rather by thorough analysis and careful experiment motivated by a high desire to so adjust the materials and forces of the world as to produce better conditions for the lives of men and women. Upon no other group than that which we may call the profession of business has there been conferred greater opportunity, or greater responsibility, for the effective social control of this new world and its complex mechanisms.

VI

It is not the purpose of this paper to suggest that the golden day of perfect business morals is about to dawn upon us; nor shall we indulge in carping criticism based upon available instances of petty chicanery and serious breaches of trust. It is rather to attract a measure of attention to the very serious consideration which has been directed upon the ethical philosophy of business, and to the development of business as a profession. For, in a world which has not yet let the ape and tiger die, and in which merchants, manufacturers and bankers must be eternally vigilant against the sharp and the unscrupulous, there would apear to be something really significant in the thought that, even so, there may be an ethic of the merchant, no less than of the soldier, the lawyer and the physician. A

recognized standard of public morality more than counterbalances all the examples of successful knavery which stick out like sore thumbs in every profession.

We make bold to affirm, therefore, the existence of the merchant ethic, the development of which parallels the evolution of the new profession of business, and the influence of which shall increase with every passing year. This merchant ethic shall be no mere bundle of censorious utterances, but, on the contrary, the expression of a desire to employ all material factors for the greatest good of our common humanity. It shall therefore promote a high order of personal knowledge and efficiency. Responding to the spirit of the law and the influence of the older professions, the merchant ethic shall profess a discriminating regard for all actual and implied fiduciary relationships. And finally, it shall affirm a sense of social responsibility, bringing upon merchants generally, as upon teachers and physicians, the stimulating realization that their efforts are strengthening, and not weakening, their fellow men in the ancient task of adjustment to an ever changing world of economic insufficiency.

MEETING OF ASSOCIATION OF AMERICAN LAW SCHOOLS

By Albert J. Harno
Secretary, Association of American Law Schools

THE twenty-eighth annual meeting of the Association of American Law Schools was held in the Stevens Hotel, Chicago, on December 29, 30 and 31. The morning of the first day was devoted to the President's address and to business of the Association. Four schools, the University of Maryland School of Law, the University of Richmond T. C. Williams School of Law, Duke University School of Law and Valparaiso University School of Law were admitted to membership. Two schools were voted on probation for having violated the articles of the Association and one was excluded from membership.

The penalty of exclusion was visited on the University of Mississippi School of Law. This action was taken after the Association had heard a statement of the findings of the Executive Committee. Its report bearing on the situation was concluded with the following statement and recommendation:

"Pursuant to an inspection of conditions at the University of Mississippi and in its Law School, the Executive Committee of the Association has found that the University of Mississippi has been and is so subjected to and affected by political influences and arbitrary actions by persons in authority over the University as to render impossible the maintenance in its Law School of the sound educational policy contemplated by membership in the Association. The Executive Committee therefore recommends to the Association that the University of Mississippi be excluded from membership in the Association."

The principal addresses, for the most part, were critically inspective of the work and the functions of law schools. Professor Edson R. Sunderland, President of the Association, took for his address the subject *The Law Schools and the Legal Profession.* Does the profession view the law in perspective? Does the lawyer ever stop to inquire, as he labors over his professional duties, how does the law work and why does it work that way? The legal profession fails to see the law in relief "as a universal principle of social control." It applies "legal processes technically and ruthlessly without regard to the injury which individuals may suffer thereby," and "it shows little interest and contributes inadequate leadership in making the law more responsive to social needs." This is the critic's (Mr. Sunderland so designated him) complaint against the profession. But where the profession lacks vision there also the law schools are likely to be near-sighted. Both, it seems, need the same corrective lens. In fact, in this case the suspicion lingers (Mr. Sunderland through apt inflection of words, caused it to linger) that the law schools are more at fault than the profession. If the profession "shows too little restraint in its use of the powerful weapons furnished by the courts, may not the schools be at fault in keeping their students submerged in a technique which over-emphasizes litigation; and if it makes no adequate contribution to the improvement of the law, may this not be a material result of the attitude of the schools in largely ignoring the importance of legislation as a means for adjustment to social changes."

Proceeding from these premises, three charges were developed by the speaker against the methods of instruction now pursued in the law schools. Law schools are apt not to perceive the forest for they busy themselves too much looking at trees—they do not view the law broadly as a science. They give students over-doses of some parts of the law and woefully neglect prophylactic measures—they do not emphasize legislation as a substitute for litigation. Finally, they dwell on cases using them as the principal material for instruction and thus dramatize and over-emphasize litigation.

The program of the afternoon of the first day of the meeting was devoted to a symposium on the subject *The Duty of the Law School to the Public.* The Executive Committee thought, as it planned this discussion, to get a variety of views on this topic in order to develop a well rounded criticism of the legal profession and more particularly of the law schools which recruit the profession. It planned to obtain expressions on this subject from representatives of three groups. First, from a representative who was committed to no special interest other than the interests of the public; second, from one who was closely associated with the interests of capital, and third, from one whose interests and connections were with labor. Bishop Edwin H. Hughes was the spokesman of the first group; Mr. Anan Raymond, Vice-President of the Foreman Trust & Savings Bank of Chicago, spoke for the second group, and Mr. Victor A. Olander, Secretary-Treasurer

of the Illinois State Federation of Labor for the third group.

Bishop Hughes had observed when lawyers discuss the aims and the ethics of the profession, that their remarks are "lofty and high-minded." He ventured the assertion that the "teaching in our law schools is of the like type; and that Solon and Lycurgus and even Moses and Calvin would gain fresh courage from the formal instruction given to students of the law." But a different point of view is shown when abstract discussions give way to battles over the interests of litigants. Then "certain prescribed processes are necessary. These are both slow and expensive and they put the poor man at a fearful disadvantage. Precedents and technicalities are inevitable, and these may often be lifted to such a height that the public sees them rather than the treasures which they guard."

Mr. Raymond pointedly, though politely, told the assembly what the business man desires as a product from the law schools. This, of course, was but another way of stating what the business man expects of the lawyer. What he expects but does not get, for the business man is disappointed in the legal advice given him. The lawyer is cast in too narrow a mold adequately to aid business. Lawyers are needed more bountifully than now supplied who understand the "ordinary business process." The lawyer bears a responsibility to assist in coordinating and harmonizing problems relating to capital and labor, consumer and producer, and industry and those who derive their sustenance from it, to the end that business "may be in all respects an agency of social service and general economic betterment." The law schools, said Mr. Raymond, "should train lawyers who know what business is and why; who understand the laws of economics, or at least how they operate in practice; and who, moreover, understand that the lawyer's own service must be a productive one, and that the fee paid him is just one more charge which the business itself must off-set by increased production, if it is to live up to the mathematical laws which are its life and death."

The business man is progressive and alert; he seeks to eliminate waste and indirection. His training and outlook are such that he cannot understand "why a simple agreement should have to be couched in unintelligible language; why, if there is a controversy about the meaning of that agreement, the pleadings have to be stated in language not only unintelligible but also archaic (Mr. Raymond perhaps does not understand that in this criticism he has hooked a sacred fish of the profession); why he should have to wait months or years to get the controversy adjudicated; or why, once it is adjudicated, the adjudication may be upset by some departure from a purely technical rule of draftsmanship or procedure."

Mr. Olander, speaking as a representative of that portion of our citizens, the laboring people, in the closing address of the symposium, contributed admirably to the discussion. He was unable, he said, to qualify as an authority on law or as a law teacher, but he spoke better (or was his statement but an utterance of modesty) than he knew. His address showed a thorough understanding of certain phases of the law and when he touched more specifically on the duties of law schools, no imagination was needed to recognize in his statements the views held by no inconsiderable portion of law teachers. It is the duty of the law school properly to qualify aspirants to the profession for entry into a vast field of human activity. "To enable the students to acquire a knowledge of the letter of the law as it happens to be at the moment, or as it has been in the past, is not sufficient. They must be given some understanding of the men and the women and the children, and of the institutions and things to which the law applies, and without which the law is nothing." Expanding this view later in his address, he said, that neither the lawyer, nor indeed the judge, can give adequate service in the proper development and application of law unless he is familiar with the developments of life around him, not merely as reflected in specific cases which he is called upon to handle within the confines of a court room and a law office, but as those facts exist in the community as a whole.

In another portion of his address he spoke even more to the point. Allow me, said he, "to submit some questions. Should there not be—or is there?—in connection with the law school something equivalent to a laboratory in which teachers and students may, through contacts maintained with the community at large, search out the facts of daily life, and by investigation and analysis, test the laws relating to them? Cannot the legal scholar, like the chemist, bring under his scrutiny all the elements necessary to thorough inquiry and research? Is the law teacher in the law school given ample opportunity to talk with the people, to know them, to learn their problems, to walk with them and become acquainted with their point of view? How else can he really know the law, if he does not know its consequences for good or evil in the life of the people without whom the law is nothing?"

Maj. Edgar B. Tolman of the Chicago Bar, who spoke at the dinner, dealt kindly with law schools and law teachers. Until recently the profession was divided into two main divisions—the bench and the bar. A new division is now recognized—the law teachers. The law teacher in the past was not fully understood by the practitioner or the judge. He was looked upon as a "theorist who had little experience or knowledge of practical affairs." He was endured as a mere "pedagogical necessity." Today the attitude of the profession toward him is changed. "He is recognized not only as an instrumentality to insure a sufficient supply of educated and equipped men to enter the profession and take up and confidently carry on the work of those whose working days are over, but as men who can and must be consulted day by day in all that is going on to develop law as a science."

Mr. Philip J. Wickser of the Buffalo Bar, was on the program the last day of the meeting and spoke on the subject *Law Schools and the Law.* How the law works must be studied in the terms of life. This involves "the backgrounds, the soil, the geography, the traditions, the economy, against which and wherein law is seeking to function." The law of England is much the same as our own, yet were we "to transport the entire English bar and judiciary to any state in this country, let it operate according to its own procedure and precedent, and operate exclusively, we should not have there the same law as obtains today in England." The law is sensible to many inter-acting forces. "If a law school sends the bar examiners some hundred of applicants and says: 'The lowest twenty per cent of these men barely graduated—we do not think they know much,' and a portion of them, nevertheless soon squeeze through, they, and their acts, are potentially, but of a certainty, a part of tomorrow's law."

The lawyer himself is a product of many interacting forces, but of these, three agencies (so believes Mr. Wickser) "occupy practically all of the immediate foreground. These are the schools, the bar poli-

tic, and that group which includes the legislatures, courts, character committees and examining boards." These agencies, in the main (Mr. Wickser said "almost exclusively") are responsible for the lawyer. "They mould, stamp, and in a sense, manufacture him." And as this idea begins to take shape, a new light is given us on the very nature of the law itself. What these agencies "do is not the law in any narrow functional regard. Yet it surely is of the essence of the law through the forces, positive and negative, which they generate, and which, in turn, so profoundly influence the functioning of their end-product."

These agencies while they are aware of each other's existence "have no clearing house for ideas." There is no intelligent collaboration among them. "Each runs on but a fraction of its power." Should the courts (inquires Mr. Wickser) and the "examiners be in corporate touch with the schools? Have the examiners a duty in common? Must the schools function in unison and the stronger schools acknowledge that the problem of all is the problem of each? . . . Are the schools and the associations joint trustees or merely polite neighbors?" Through collaboration much could be accomplished and yet we have hardly begun to experiment with it. "Who then (he inquires) by patient research, candor and courage shall show us how —who point the way? The schools I hope, for unto them it has been given, and theirs is the burden."

Some of the most stimulating work of the Association of American Law Schools is to be found in its round table conferences. Eleven such conferences were in session during the last meeting. In the round table on Business Associations, Professor Adolph A. Berle, Jr., of Columbia University led a discussion on the subject *The Organization of the Law of Corporation Finance.* In the Equity round table Professor Harmon W. Caldwell of the University of Georgia and Professor William Gorham Rice of the University of Wisconsin discussed the subject *The Use of Equity to Prevent Crime.* A further topic in this round table, *The Restatement of the Law of Trusts,* was discussed by Dean Thurman W. Arnold of West Virginia University and by Professor Austin W. Scott of Harvard University. In the Public Law round table two topics were discussed. The first subject, *Due Process of Law as a Limitation on the State's Jurisdiction to Tax Intangibles or their Transfer,* was considered by Professor Henry Rottschaefer of the University of Minnesota and by Professor William H. Page of the University of Wisconsin. In the other, *The Function of the Senate in Considering Nominations by the President to the Supreme Court of the United States* was discussed by Professor Forrest R. Black of the University of Kentucky and Professor Kenneth Sears of the University of Chicago.

In the Teaching and Examination Methods conference the topic taken for discussion was *The Aims and Methods of Legal Education.* The leaders were Professor John Dickinson of the University of Pennsylvania, Professor John Hanna of Columbia University and Professor Joseph H. Beale of Harvard. *The Scope and Organization of the Curriculum in the Field of Criminal Justice* was the subject considered in the round table on Wrongs. Professor A. M. Kidd of the University of California and Professor Ernst W. Puttkammer of the University of Chicago opened the discussion. In the round table on Remedies, Miss Ruth A. Yerion and Professor Ray A. Brown of the University of Wisconsin opened the discussion on the subject *Procedure Under Workmen's Compensation Acts* and Professor Hessel E. Yntema of Johns Hopkins University and Professor E. M. Morgan of Harvard University considered *The Purposes and Nature of the Judicial Surveys which the Institute of Law of Johns Hopkins is Undertaking.*

In the Commercial Law conference the general topic, *Branch or Group Banking* was considered. Professor J. B. Fordham of West Virginia discussed the subject *Branch Banks as Business Entities;* Professor Roger J. Traynor of the University of California that of *Tax Problems in Branch Banking* and Mr. F. G. Awalt, Deputy Comptroller of the Currency, that of *Interdistrict Branch Banking.* In the round table on Legal Periodicals Professor Ernst W. Puttkammer of the University of Chicago discussed *Cooperative Law Reviews;* Professor William C. VanVleck, George Washington University, *Specialized Law Reviews* and Professor Frederick K. Beutel of Tulane University, *A Uniform Style Sheet.*

The subject of the *Study of Comparative Law* was taken up for consideration in the round table on Jurisprudence and Legal History. The discussion was lead by Professor Milton Handler of Columbia University. Professor Julius Goebel of Columbia considered *The Significance of the Phenomenon of Codes in the Seventeenth Century.* In the conference on Property and Status, Professor Kingsley of the University of Southern California and Robert C. Brown of Indiana University discussed the question of *Cruelty as a Ground for Divorce.* In this round table Professor Austin W. Scott of Harvard, Richard R. B. Powell of Columbia University, George G. Bogert of the University of Chicago and Charles E. Clark of Yale University discussed the subject *Division of Income Between Life Tenant and Remainderman.*

The following officers were elected for the year 1931: Dean Herbert F. Goodrich, University of Pennsylvania, President; Dean Albert J. Harno, University of Illinois, Secretary-Treasurer; Dean Rufus C. Harris of Tulane University, Professor Edson R. Sunderland of the University of Michigan and Professor George J. Thompson of Cornell University were elected members of the Executive Committee.

The Barristers Club

By F. REGIS NOEL
Member of the District of Columbia Bar

THE article entitled, "Junior Bar Movement," by Matthew C. Tobriner, Esq., of the San Francisco Bar, in the February, 1931, issue of the AMERICAN BAR JOURNAL, contains statements very agreeably surprising to a large number of attorneys in the District of Columbia. He states:

"In three large cities of this country associations of young lawyers have been organized, limited to those who have practiced less than a certain number of years or who have not attained a certain age. Such a movement is probably unique in this country. In San Francisco, Los Angeles and Oakland, California, these junior bar organizations are active, functioning bodies."

In the fall of 1923, the original Barristers Club was organized at Washington, District of Columbia. This organization was promptly incorporated under what is generally considered a Congressional or National charter. The charter provides, specifically, for affiliated clubs. The objects of the Club include the close association of the younger members of the Bar in more intimate social contacts;

the attainment of Lord Bacon's well founded theory, that "young men are fitter to invent than to judge; fitter for execution than for counsel; and fitter for new projects than for settled business"; and, to assemble a group calculated to be most efficient in handling the legal aid work and kindred matters in the District of Columbia. Accordingly, after careful thought by the originators of the idea, the membership was limited to thirty-five outstanding younger members of the Bar and further limited to the age of thirty-five years at admission. The age limit was fixed in order to keep the control of the organization always in the hands of young practitioners with consequent young ideas. The Membership Committee has followed the policy of admitting only members of well established firms, individuals who displayed signs of distinction at the Bar, ex-members of the District Attorney's staff, Corporation Counsel's staff, and similar official departments.

It is obvious that a membership of this type is peculiarly equipped with contacts to do legal aid work in the quickest and most efficient manner. A Legal Aid Director, to act as clearing house, also, was provided. The functions of the Legal Aid Director are to interview all applicants for the services of the group, to apply certain standards as to affording legal aid to the particular case and then, knowing the peculiar qualifications of each member, to send the applicant's case, with instructions, to the member best situated to handle it. This system supplies the best type of legal aid specialists and costs nothing. We have no paid staff and no overhead.

Washington has not the same legal aid problems as prevail in most cities. With exception of the colored population, the standard of intelligence is from Civil Service rating upward. There is little industrialism, and a large part of the population has permanent employment by the Federal Government. Hence there is not the serious social problem in the District of Columbia encountered elsewhere. The Barrister Club idea has adequately handled this phase of public service without much strain. However, from the outset, we had in mind the further resource of calling on likely candidates for membership in the Club and on Law School students to help if our membership becomes unable to supply the demand for services.

The Barristers early adopted rather more strict standards as to what is a legal aid case than is prevalent among legal aid societies. In order to avoid criticism, no case is considered a legal aid case from which an attorney may earn a fee; thus domestic relations cases and all collections have been declined. A further policy has been that, if a case is sent to the Director which is not a legal aid case, and some one to handle it is requested, a practicing attorney outside the membership of the Barristers who is peculiarly qualified to handle it is suggested.

The American Bar Association Canons of Ethics form part of the by-laws of the Barristers, and each member, at initiation, is required to sign the by-laws and afterwards to observe them.

The Barristers Club gathers at a monthly luncheon, usually on a Saturday, at which there is always invited an outstanding leader of the American Bar or some public officer as guest and speaker.

This luncheon is held after the week's toil is over, and several hours are spent in listening to most excellent instruction. Judges of the United States Supreme Court, Attorneys General and Solicitors General, Court of Claims Judges, all local Courts, celebrities of the Bar from all parts of the country and even from abroad have related to the Barristers and their guests many of their experiences and offered most helpful suggestions.

The Barristers Club holds an annual dinner. In the past it has always been the most successful function of the local Bar, probably because the members being younger and not so much involved in great problems of practice, have had plenty of leisure to plan and execute their ideas. They have always had a very unusual array of guests of honor and interesting entertainment features.

During the course of a year there are probably four or five strictly business meetings, business being proscribed at the social affairs. The Barristers Club has made many contributions to Court procedure, sponsoring civic events which touch the profession, such as "Constitution Week."

The original membership embraced about twenty members. In the course of seven or eight years, due to members going beyond thirty-five years of age, when they become practically honorary members with no right to vote, the membership now embraces about seventy of the local Bar. It has been a great feeder for the senior Bar Association and a large number of the most active members of the senior Bar Association are ex-Barristers.

The original officers of the Barrister Club were the following: President, F. Regis Noel; Vice-President, Lucian H. Vandoren; Secretary, Paul V. Rogers, Treasurer, Joseph A. Rafferty. Executive Committee: Frederick A. Stohlman, Bertram Emerson, Jr., and Paul B. Cromelin.

A few years ago, the parent Barristers Club made plans to expand the Barrister Club idea, and nibbles at it were made in several near-by cities. The Chairman of the Committee, who was eminently qualified for such propaganda, unfortunately suffered protracted illness, and the movement seems to have become sympathetic with its Chairman. However, the entire Washington Bench and Bar has nothing but the highest endorsement of the scheme and is very glad to know that the idea has been emulated in the far West. The gaps between us easily should be filled. It may be, however, that the original idea has been somewhat varied, since it is noted that one of the groups has a membership of four hundred. It seems that such a large membership in a junior bar must necessarily detract from the membership of the senior Bar.

The first officers of the original Barristers Club, mentioned above, are still members, and would be glad to receive inquiries from other attorneys looking to the establishment of affiliated Barristers Clubs.

NEWS OF STATE AND LOCAL BAR ASSOCIATIONS

Florida

Florida Bar Holds Annual Meeting

The Florida State Bar Association held its annual meeting January 29, 30 and 31, 1931, at Daytona Beach. The first day was devoted to the Conference of Delegates of Local Bar Associations. On the last two days the general meetings of the Association were held and many social functions were enjoyed.

The Conference of Delegates, which has been for the last three years devoting itself to the study of expediting chancery procedure, made its final recommendations to the Association, which were embodied in a suggested bill prepared by a special committee headed by Mr. E. J. L'Engle of the Jacksonville bar. The Association unanimously approved the suggested bill and will ask the forthcoming Legislature to enact it into law.

Chas. A. Boston, president of the American Bar Association, Dean Justin Miller of the Law Department of Duke University and Associate Justice W. H. Ellis of the Florida Supreme Court, were among the distinguished speakers appearing on the program.

At the annual banquet the guest-speakers were Judge Arthur W. Powell of Atlanta and Captain, now Sir Malcolm, Campbell of England, who was in Daytona Beach to try and break the world's automobile speed record, and did so a few days later, on the world famous Daytona beach.

John C. Cooper, Jr., of Jacksonville, was elected president of the Association without opposition. Since its creation, Mr. Cooper has edited the Florida Bar Association Law Journal. He is considered one of the outstanding lawyers of Florida, is a deep student of the law, erudite and gracious, and is expected to be a constructive leader of the Association during his administration.

Ed R Bentley of the Lakeland bar was re-elected Secretary-Treasurer.

Miscellaneous

The annual meeting of the Bar Association of the District of Columbia was held at the court house on Tuesday evening, January 13, 1931.

The election of officers resulted in the choice of Mr. George P. Hoover, as president; Mr. Richard E. Wellford, first vice-president; Mr. Edmund L. Jones, second vice-president; Mr. George C. Gertman, secretary, and Mr. W. W. Millan, treasurer. Colonel J. Miller Kenyon, Mr. Milton W. King and Mr. F. Regis Noel were elected directors for a period of two years.

The one hundred and ninty-ninth anniversary of Washington's birthday was observed with a banquet and social gathering of the Snohomish County Bar Association in the Monte Cristo Hotel, at Everett, Washington, on the evening of February 21st, 1931. This is an affair held annually, almost without interruption, ever since the formation of the Association in 1892.

More than 100 members, with their wives and guests were present, and after introduction by the president, the Hon. T. E. Skaggs acted as toastmaster. Several members of the Supreme Court of the State of Washington, with their ladies, came up from Olympia.

Charles R. Denney, prosecuting attorney for Snohomish County, gave the address of welcome to the ladies, to which

Mrs. Lulu Shakespeare—the only woman member of the Bar in the county—graciously responded. The Hon. Ralph C. Bell, Superior Court Judge, had been chosen to welcome the Supreme Court Judges, and Chief Justice Tolman made the response.

Glenn J. Fairbrook, president of the Washington State Bar Association, with Mrs. Fairbrook, were present from Seattle, and Mr. Fairbrook, in a few well chosen and pithy remarks, captured the fancy of every one at the gathering.

Music was furnished by the Everett High School string quartet, a vocal selection by Harold Jory, accompanied by Mrs. Jory, also Mary Catherine Breck, accompanied by Louise Stiger, with community singing of patriotic songs.

Associate Justice of the Supreme Court, Walter P. Beals, was the orator of the occasion, and delivered a forceful and masterly address delineating some of the outstanding characteristics of Washington, the man, stating—among other things—"that in all history there never has been known his equal in unselfish character and exalted patriotism."

The retiring president is Alex. McK. Vierhus, and the new officers for 1931, are S. J. Brooks, president; Noah Shakespeare, vice-president; Jasper L. Rucker, secretary; and Phil G. Warnock, treasurer. S. J. BROOKS.

Judge Matthew Walton, was elected, by acclamation, President of the Fayette County (Kentucky) Bar Association at a recent meeting of that organization. Other officers chosen were Clinton M. Harbison, First Vice-President, Hogan L. Yancey, Second Vice-President, Anthony Thomson, Treasurer, and Austin Moore, Secretary.

The Tazewell County (Ill.) Bar Association held its annual meeting and banquet in February and chose the following new officers: Walter G. Cunningham, President; L. P. Dunkelberg, First Vice-President; Clarence Waltmire, Second Vice-President; R. M. Culbertson, Third Vice-President, E. H. Albertsen, Secretary, and Harold D. Rust, Treasurer.

Charles A. Cantwell, of Reno, was elected President of the Washoe County (Nev.) Bar Association at the annual meeting of that organization on February 11th. Vice-Presidents elected were Samuel W. Platt and Roy W. Stoddard. Miles N. Pike was elected Secretary and Arthur M. Lasher, Treasurer.

The Iowa County (Ia.) Bar Association held its annual meeting in February. T. A. Lane, of Victor, was chosen President and J. M. Dower, Vice-President. E. J. Sullivan, of Marengo, remains as Secretary and Treasurer.

At a recent meeting of the Lake County (Ill.) Bar Association, Albert Hall was elected President, Charles E. Mason, Vice-President and Jack Bairstow, Secretary.

The Orange County (N. Y.) Bar Association, at its recent annual meeting, elected Frank H. Finn, of Middletown, President; J. Bradley Scott, of Newburgh, First Vice-President; John Bright, of Middletown, Second Vice-President; A. S. Embler, of Walden, Third Vice-President; Charles H. Shaw, of Middletown, Secretary, and Peter Cantline, of Newburgh, Secretary.

Judge E. A. Rogers, was elected President of the Bar Association of Salt Lake City, at the annual meeting of that organization in February. Other officers chosen are: Gaylen S. Young, Vice-President, and E. C. Jensen and Ben E. Roberts, renamed Secretary and Treasurer, respectively.

At the annual meeting of the Westchester County (N. Y.) Bar Association held in White Plains on February 6th, LeRoy N. Mills, of Scarsdale, was elected President. Albert W. Haigh and Silas S. Clark, both of White Plains, were re-elected Treasurer and Secretary, respectively.

The New Rochelle (N. Y.) Bar Association re-elected the following officers at a business session held February 11th: Samuel F. Swinburne, President; Walter G. C. Otto, Vice-President; John H. McCormick, Secretary; Leo Ferrara, Secretary.

Roger E. Chapin, was installed as President of the Sangamon County (Ill.) Bar Association, at a recent meeting of that organization. Charles Andrus was made Vice-President and Alton Hall, Secretary-Treasurer.

The Lewis County (Wash.) Bar Association, at a meeting held February 2nd, elected William H. Grimm, of Centralia, President; W. H. Cameron, Centralia, Vice-President; Grant Armstrong, Chehalis, Secretary, and B. H. Rhodes, Centralia, Treasurer.

Ballinger Mills was unanimously re-elected President of the Galveston (Tex.) Bar Association for the ensuing year at a meeting of the Association on February 4th. Other officers were re-elected as follows: Owen D. Barker, Vice-President; Henry W. Flagg, Secretary, and Herman Kleinecke, Jr., Treasurer.

The Minneapolis (Minn.) Bar Association re-elected George B. Leonard President, at the recent annual meeting of the organization. Edward Nelson was re-elected Vice-President, and S. D. Klapp, Secretary and Treasurer. Lee B. Byard, Edwin C. Brown, Edward J. Lee, Paul S. Thompson and C. E. Purdy were re-elected members of the Executive Committee.

Members of the Otoe County (Neb.) Bar Association met in annual session on February 9th. Senator William H. Pitzer was elected President, Judge W. W. Wilson, Vice-President; and John C. Miller (re-elected) Secretary.

At a meeting of Randolph County attorneys recently held the Randolph County (Ind.) Bar Association was formed. John W. Macy, of Winchester, was chosen President; George Ward, Vice-President; E. F. Bowen, Secretary and Treasurer.

T. J. Newlin, of Robinson, was chosen President of the Crawford County (Ill.) Bar Association at its annual banquet in January. P. G. McCarty was re-elected Secretary and Treasurer of the Association.

The El Paso County (Tex.) Bar Association held its annual meeting on January 24th and officers for the ensuing year were chosen as follows: Judge Clyde L. Starrett, President; W. S. Jackson, Vice-President; C. J. Simon, Secretary, and Irvin E. Jones, Treasurer. Trustees elected are Judges Arthur Cornforth, John C. Young and James F. Sanford.

At the annual meeting of the St. Louis County (Mo.) Bar Association recently held new officers were chosen as follows: Hon. Amandus Brackman, President; Hon. Arthur V. Lashly, First Vice-President; Hon. Gustavus A. Wurdemann, Second Vice-President; Alfred H. Kerth, Secretary, and Probate Judge Sam A. Hodgdon, Treasurer.

At the annual meeting of the Winnebago County Bar Association which was held at the Court House at Rockford, Illinois, on Monday, January 12, 1931, the following officers were elected for the present year: President, Charles H. Linscott; Vice President, Nels P. Nelson; Secretary, John R. Snively, and Treasurer, Eldred E. Fell.

The new President served in the office of the Attorney General of the State of Illinois under Honorable Patrick J. Lucey and is a member of the law firm of North, Linscott, Gibboney & North. He was Vice President of the Association last year. Mr. Nelson, the new Vice President, is a former Assistant State's Attorney of Winnebago County and the senior member of the law firm of Nelson & Nelson. Mr. Snively and Mr. Fell are serving their fourth term in their respective offices. The retiring President was David D. Madden, Corporation Counsel of the City of Rockford and the senior member of the law firm of Madden & Laden.

The Association had a very active year, having entertained the members of the Judicial Advisory Council of Illinois and having been hosts to the delegates and lawyers that attended the annual meeting of the Federation of Local Bar Associations for the Sixth Supreme Judicial District in addition to its other activities and meetings. It has also sponsored the movement to secure the location of the headquarters of the United States District Court for the Western Division of the Northern District of Illinois at Rockford.

JOHN R. SNIVELY, Secretary

W. J. Courtright was chosen President of the Dodge County (Neb.) Bar Association at the annual meeting of that Association recently held. Other officers chosen were as follows: A. K. Dame, Vice-President, and Hon. Fred C. Laird, Secretary-Treasurer.

At the annual meeting of the Peoria County (Ill.) Bar Association, held in January, the following new officers were elected: George A. Shurtleff, President; E. L. Covey, First Vice-President; E. J. Galbraith, Second Vice-President, and Verle Safford, Secretary-Treasurer.